

Marquette Benefits and Social Welfare Law Review

Volume 20
Issue 2 *Spring*

Article 3

2019

Where the Law Ends - Part 1: *M&G Polymers v. Tackett* and *CNH Industrial v. Reese* - Federal Labor Policy, the Interpretation of Collective Bargaining Agreements, and the Failure of *Stare Decisis*

Roger J. McClow

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McClow, Roger J. (2019) "Where the Law Ends - Part 1: *M&G Polymers v. Tackett* and *CNH Industrial v. Reese* - Federal Labor Policy, the Interpretation of Collective Bargaining Agreements, and the Failure of *Stare Decisis*," *Marquette Benefits and Social Welfare Law Review*. Vol. 20: Iss. 2, Article 3.

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**WHERE THE LAW ENDS – PART 1:
M&G POLYMERS V. TACKETT AND CNH INDUSTRIAL V.
REESE - FEDERAL LABOR POLICY, THE
INTERPRETATION OF COLLECTIVE BARGAINING
AGREEMENTS, AND THE FAILURE OF STARE DECISIS**

Roger J. McClow*

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I. INTRODUCTION

Few concepts are more fundamental to American democracy than the impartiality of the judicial branch of the government. One of the “injuries and usurpations” tending to “absolute Tyranny” recited in the Declaration of Independence was that King George III had “made Judges dependent on his will alone.”¹ The means of this dependency – the King’s control over the “tenure of their offices” and “the amount and payment of their salaries”² – were explicitly addressed in Article III of the Constitution.³ But, life tenure and a guaranteed salary, while reasonable and perhaps necessary, are insufficient to protect against judicial bias.

Among the most important judge-made rules to increase the odds of impartiality in decision making is the doctrine of *stare decisis*. The tendency to make arbitrary decisions is reduced when a court is required to honor established judicial decisions. Of course, the doctrine requires that, before a decision is made, existing precedent is identified, addressed and, unless overturned for well-documented reasons, followed.

This article explores two related decisions, *M&G Polymers USA, LLC v. Tackett*⁴ and *CNH Industrial, LLC v. Reese*,⁵ where the Supreme Court ignored long-standing precedent and adopted and applied contrary legal standards. The specific issue was the legal standard for determining the contractual rights of retirees with collectively bargained healthcare benefits.⁶ While the context was not one with Constitutional implications, at least on its face, the overriding issue of maintenance of judicial impartiality *was* implicated. The fact that, as a result of the decisions, tens of thousands of retirees lost or will lose their healthcare benefits,⁷ is a minor loss compared to the damage done if the Supreme Court can bypass the requirements of *stare decisis* by simply refusing to acknowledge – and in the process disregarding – the holdings of, and the policies underlying, its earlier decisions.

1. THE DECLARATION OF INDEPENDENCE para. 2, 11 (U.S. 1776).

2. *Id.* at para. 11.

3. U.S. CONST. art. III, § 1.

4. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).

5. *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018).

6. *Id.* at 762-63.

7. *Id.* at 764.

II. THE IMPORTANCE OF BEING IMPARTIAL

A. Constitutional Implications

The possibility that justice would be perverted by the rich and powerful was a fundamental concern of the Founding Fathers. According to John Locke, a major source for their political philosophy, a person who abandons the law of nature for the benefits of political society, also abandons the law of personal justice.⁸ The primary function of political society is to serve as the arbiter of disputes that arise among society's members over competing personal rights. In this context, justice must be administered so that society understands that the government treats all citizens equally under the law. Or, as Locke stated: there must be "one rule for rich and poor, for the favorite at court, and for the country man at plough."⁹

The "thirteen united States of America" in declaring their independence from Great Britain, accused King George III of a "history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."¹⁰ Among these usurpations was that King George "has obstructed the Administration of Justice by refusing his Assent to Laws for the establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."¹¹

These concerns – that the new federal government would make judges dependent on *its* will alone, thus supplanting the British sovereign so recently deposed – were directly addressed in Article III of the United States Constitution. Section I of Article III provides, in its entirety:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in

8. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 342-44 (Peter Laslett ed., 2d ed.).

9. *Id.* at 381.

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. *Id.* at para. 10, 11.

Office.¹²

Article III does not require that federal judges be impartial. Instead, the two expressed requirements, lifetime tenure and undiminished compensation, were intended to make the judiciary independent of both the President and the Congress, ensuring that judges would be, if they so choose, free from the pressures of temporal political forces and thereby more likely to be impartial.

In *The Federalist Papers* No. 78, Alexander Hamilton wrote that courts possess “neither *force* nor *will*, but merely judgment . . .”¹³ Judicial authority can come only from public perception of the “integrity and moderation”¹⁴ of the courts. Without that perception, Hamilton wrote, the rule of law is undermined, “sap[ping] the foundations of public and private confidence, and . . . introduc[ing] in its stead universal distrust and distress.”¹⁵

In *Planned Parenthood of Southeast Pennsylvania. v. Casey*,¹⁶ the Court said that, because a court cannot generally “coerce obedience to its decrees,” its “power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”¹⁷

Former Justice Kennedy reiterated that fundamental theme in *New York State Bd. of Elections v. Lopez Torres*:¹⁸ “The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.”¹⁹ According to the Seventh Circuit in *Bauer v. Shepard*:²⁰ “The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife.”²¹

12. U.S. CONST. art. III, § 1.

13. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

14. *Id.* at 470.

15. *Id.*

16. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See also *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments.”).

17. *Id.* at 865. See also *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments.”).

18. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

19. *Id.* at 212 (Kennedy, J. concurring).

20. *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010).

21. *Id.* at 712.

These lofty statements declare an aspiration rather than a reality. Judicial independence and impartiality are ideals, not foregone conclusions. Given the multiple factors involved in most decisions, and the fact that all appellate decisions require the concurrence of more than one judge, judicial impartiality is an abstraction which cannot easily be objectively measured. And, because the judicial system seldom directly affects ordinary citizens, whether and when the ideal approaches the reality is something that most citizens rarely consider, or if they consider it, often cannot possibly fathom. It is thus important that any departures from the ideal be brought to light and carefully examined.

While litigants have a Constitutional right to an impartial court, that right comes, not from Section III, but from the Due Process Clause.²² The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”²³ In *In re Murchison*,²⁴ the Supreme Court held that “[a] fair trial in a fair tribunal is a basic requirement of due process.”²⁵

The standard for judicial impartiality under the Due Process Clause is an objective one that does not require a showing of actual bias. Instead, “[i]n defining these standards the Court has asked whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”²⁶ In *Coley v. Bagley*,²⁷ the Sixth Circuit stated “[s]ince judicial bias is a structural defect both when actual and when merely unconstitutionally probable, if either type of judicial bias is proven, *Strickland* prejudice need not be proven.”²⁸

In practice, judges decide claims of bias and judges have proven reluctant guardians of the people’s right to an independent, impartial judiciary. The presumption is, and probably must be, that judges will act impartially regardless of their personal ideology.

22. U.S. CONST. amend V. Nothing in Article III requires judicial impartiality. In fact, the right to lifetime tenure makes it much more difficult to remove a judge who proves, *after* appointment, to be biased in decision making.

23. *Id.*

24. *In re Murchinson*, 349 U.S. 133 (1955).

25. *Id.* at 136.

26. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

27. *Coley v. Bagley*, 706 F.3d 741 (6th Cir. 2013).

28. *Id.* at 750 (citing *Strickland v. Washington*, 466 U.S. 668, 691-96 (1984) (internal citations omitted)).

Challenges based on perceived bias implicate a judge's personal integrity. Judges judging themselves undoubtedly most often believe they are unbiased or that they can decide cases fairly despite personal beliefs. Judges judging other judges bend over backward not to do so, based on concerns of collegiality or that they too will appear biased in their assessment.

The Supreme Court has held that the Due Process Clause requires recusal of judges only in extraordinary circumstances, a point well illustrated by the facts of *Caperton v. A.T. Massey Coal Co.*²⁹ There, Massey Coal had appealed a \$50 million adverse jury verdict to the West Virginia Supreme Court of Appeals.³⁰ While the appeal was pending, the CEO of Massey Coal contributed \$3 million to replace an incumbent on the Supreme Court with an attorney more sympathetic to its position.³¹ After Massey's candidate was elected, he refused to recuse himself and, in fact, became the deciding vote in reversing the judgment against his benefactor.³² A bare majority of the United States Supreme Court concluded that, under these circumstances, the Due Process Clause required the judge's recusal.³³

B. The Doctrine of Stare Decisis

Litigants are not solely dependent on the Due Process clause to protect them from arbitrary judicial decision-making. Courts, through rules and common law decisions, have established certain prudential standards intended to reduce judicial bias. Perhaps the best known of these is the doctrine of *stare decisis*. The words "*stare decisis*" is a shortened form of the Latin maxim "*stare decisis et non quieta movere*" which means "to stand by decisions and not disturb the undisturbed."³⁴ *Stare decisis* is the age old common law policy that courts should adhere to principles of law developed and decided in their earlier decisions.

In *Patterson v. McLean Credit Union*,³⁵ the Court described *stare decisis* as "of fundamental importance to the rule of law"³⁶ and as a

29. *Caperton*, 556 U.S. 868.

30. *Id.* at 874.

31. *Id.* at 884.

32. *Id.* at 875.

33. *Id.* at 871.

34. GABRIEL ADELEYE & KOFI ACQUAH-DADZIE, *WORLD DICTIONARY OF FOREIGN EXPRESSIONS: A RESOURCE FOR READERS AND WRITERS* 371 (Thomas J. Sienkewicz & James T. McDonough, Jr. eds., 1999).

35. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

36. *Id.* at 172 (quoting *Welch v. Tex. Dep't of Highways & Pub. Tr.*, 483 U.S. 468, 494

“basic, self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based on ‘an arbitrary discretion.’”³⁷ Justice Benjamin Cardozo referred to *stare decisis* as the “every day working rule of our law.”³⁸ Concurring in *Hubbard v. United States*,³⁹ Justice Scalia stated:

The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of “an arbitrary discretion in the courts” is restrained, *The Federalist* No. 78, p. 471 (C. Rossiter ed. 1961). Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).⁴⁰

In his concurrence in *County of Allegheny v. American Civil Liberties Union*,⁴¹ Justice Kennedy stated: “As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.”⁴²

Stare decisis is a principle of policy, not an inexorable command.⁴³ “Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved.”⁴⁴ The policy also has special force with regard to questions of statutory interpretation.⁴⁵ It has least force in cases involving procedural rules implicating fundamental Constitutional protections.⁴⁶ Relevant factors as to whether to follow or change existing precedent include the “antiquity of the precedent, the reliance interests at stake,” and whether the precedent was well

(1987)).

37. *Id.* (quoting THE FEDERALIST NO. 78, at 490 (H. Lodge ed. 1888) (A. Hamilton), *superseded by statute on other grounds*, Civil Rights Act of 1991, 105 Stat. 1071, *see* CBOCS West, Inc. v. Humphrey, 553 U.S. 442, 450 (2008)).

38. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20 (1921).

39. *Hubbard v. United States*, 514 U.S. 695 (1995).

40. *Id.* at 716 (Scalia, J., concurring).

41. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

42. *Id.* at 664 (Kennedy, J. concurring).

43. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), *reh’g denied*, 501 U.S. 1277 (1991).

44. *Id.*

45. *Kurns v. R.R. Friction Products Corp.*, 565 U.S. 625, 641 (2012).

46. *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring).

reasoned.⁴⁷

Of course, for *stare decisis* to be an effective safeguard against an arbitrary judiciary, existing precedent must first be *identified*. But, in both *Tackett*⁴⁸ and *Reese*,⁴⁹ the Supreme Court simply ignored its long-standing precedent on precisely what constitutes a collective bargaining agreement. Absent consideration and understanding of this critical issue, and the underlying federal labor policy on which it is based, it was impossible for the Court to determine the appropriate interpretive standards to be applied to the CBAs at issue in those cases. The result is that there are now two diametrically opposed lines of Supreme Court precedent on the issues of collective bargaining agreements and the interpretative rules that apply to them – one from before *Tackett* and one after *Tackett*.

III. AFTER *TACKETT* – CBAs “MUST BE INTERPRETED ‘ACCORDING TO ORDINARY PRINCIPALS OF CONTRACT LAW’”

A collective bargaining agreement (CBA) is an agreement between an employer and a labor organization selected by the employees to represent them in (collective) bargaining. As noted in more detail below, CBAs are governed by federal law. Section 301 of the Labor Management Relations Act, provides federal jurisdiction for their enforcement.⁵⁰

Beginning in the mid-1960s, industrial unions and private sector employers negotiated employer-paid healthcare benefits for retired employees and their spouses.⁵¹ Thereafter, beginning in the 1980’s, the issue of whether these benefits “vest,” that is, were intended by the parties to the CBA to last for the retiree’s “lifetime” or were instead limited to the duration of the CBA, was the subject of increasing litigation.⁵² In 2015, the Supreme Court decided *M&G*

47. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 362-3 (2010) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792-793 (2009)).

48. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).

49. *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 766 (2018).

50. 29 U.S.C. §185 (2012).

51. See, e.g., *Cole v Meritor, Inc.*, 855 F.3d 695, 697 (6th Cir. 2017); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 574-75 (6th Cir. 2006); *Golden v. Kelsey-Hayes Co.*, 954 F. Supp. 1173, 1178 (E.D. Mich. 1997); *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 678 (E.D. Mich. 1995).

52. See, e.g., *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988); *Century Brass Prods., Inc. v. UAW (In re Century Brass Prods., Inc.)*, 795 F.2d 265, 269 (2d Cir. 1986); *Local Union No. 150-A, UFCW v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479

*Polymers USA, LLC v. Tackett*⁵³ to resolve a perceived conflict in the Circuits that had developed over the preceding thirty years.

A. M&G Polymers USA, LLC v. Tackett

In *Tackett*,⁵⁴ the particular question was the soundness of the long-maligned inference of vesting adopted in 1983 by the Sixth Circuit in *UAW v. Yard-Man, Inc.*⁵⁵

In *Yard-Man*,⁵⁶ the Sixth Circuit initially stated that ordinary principles of contract interpretation apply to CBAs, to the extent consistent with federal labor policies.⁵⁷ The court then identified common law contract principles it considered relevant.⁵⁸ Applying those principles to the terms of the CBA, the court concluded that retiree healthcare benefits vested.⁵⁹ The court then addressed additional “contextual” factors connected to collective bargaining, in particular the legal fact that retiree healthcare is a permissive, not mandatory, subject of bargaining.⁶⁰ In this context, the court concluded that “it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past service, would be left to the contingencies of future negotiations.”⁶¹

Yard-Man then stated: “Further, retiree benefits are in a sense ‘status’ benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained.”⁶² The court cautioned that no federal labor policy presumptively favors the vesting of retiree healthcare benefits and that the “nature of such benefits simply provides another inference of intent,” which “[s]tanding alone . . . would be insufficient to find an intent to create interminable benefits.”⁶³

Over the years, the Sixth Circuit repeatedly addressed, defined and narrowed the application of the “*Yard-Man* inference.” The Sixth Circuit did so in conflicting terms, as indicated by the fact that one

(6th Cir. 1983).

53. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).

54. *Id.*

55. *Id.* at 430.

56. *Yard-Man*, 716 F.2d 1476.

57. *Id.* at 1479.

58. *Id.* at 1479-81.

59. *Id.* at 1482.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

judge characterized the inference as being either a disguised “presumption”⁶⁴ or, in a subsequent case, as “nothing more than this: a nudge in favor of vesting in close cases.”⁶⁵

In *Tackett*, the Court rejected not only the *Yard-Man* “status” inference but the entire body of Sixth Circuit law assessing collectively-bargained healthcare benefits as being contrary to “ordinary principles of contract law.”⁶⁶ After a discussion of ERISA,⁶⁷ the Court stated that: “We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy.”⁶⁸

While *Tackett* held that the *Yard-Man* inference was (wrongly) gleaned from the “‘context’ of labor negotiations” and from the “status” of retirement benefits, rather than from the CBA itself, it did not stop there.⁶⁹ *Tackett* criticized *Yard-Man*’s “purported” application of the illusory promises rule.⁷⁰ It held that, post-*Yard-Man*, the Sixth Circuit had refused to give any weight to provisions that supported a contrary conclusion, such as a general termination clause.⁷¹ *Tackett* criticized the Sixth Circuit’s post-*Yard-Man* decisions holding that “the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest healthcare benefits.”⁷² In particular, *Tackett* criticized *Noe v. PolyOne Corp.*,⁷³ where the Sixth Circuit held that a provision that ties eligibility for retiree healthcare benefits to a pension leaves “little room for debate that retirees’ health benefits vest upon retirement.”⁷⁴

Tackett could not have been more insistent that “ordinary” contract principles must govern the interpretation of CBAs: “As an initial matter, *Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all

64. *Noe v. PolyOne, Corp.*, 520 F.3d 548, 568 (6th Cir. 2008) (Sutton, J., dissenting) (“what we continually disclaim presuming we continually seem to presume”).

65. *Reese v. CNH America, LLC*, 574 F.3d 315, 321 (6th Cir. 2009).

66. *Tackett*, 574 U.S. at 435.

67. Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (2012).

68. *Tackett*, 574 U.S. at 435 (citing *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957)).

69. *Id.* at 438 (quoting *Yard-Man*, 716 F.2d at 1482).

70. *Id.*

71. *Id.* at 934-35 (citing *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 615 (6th Cir. 1985)).

72. *Id.* at 937.

73. *Id.* at 936.

74. *Noe v. PolyOne*, 520 F.3d 548, 558 (6th Cir. 2008) (quoting *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004)).

collective-bargaining agreements. That rule has no basis in *ordinary principles of contract law*.⁷⁵

Tackett disagreed that the “inferences applied in *Yard-Man* and its progeny represent *ordinary principles of contract law*.”⁷⁶ Citing *Story* and *Williston*, *Tackett* held that Sixth Circuit decisions requiring a durational clause specific to retiree benefits to prevent vesting “distort the text of the agreement and conflict with *the principle of contract law* that the written agreement is presumed to encompass the whole agreement of the parties.”⁷⁷

Tackett cited *Corbin* to show that the Sixth Circuit “misapplied other *traditional principles of contract law*, including the illusory promises doctrine” and “failed even to consider the *traditional principle* that courts should not construe ambiguous writings to create lifetime promises.”⁷⁸ *Tackett* noted the Sixth Circuit’s differing treatment of collectively bargained and non-collectively bargained retiree healthcare benefits.⁷⁹ The Sixth Circuit had held that, for non-collectively bargained benefits to vest, the intent of the parties to be “stated in clear and express language.”⁸⁰ From this, *Tackett* concluded: “The different treatment of these two types of employment contracts only underscores *Yard-Man*’s deviation from *ordinary principles of contract law*.”⁸¹

Tackett held that the Sixth Circuit’s decision⁸² was tainted by *Yard-Man* and its progeny.⁸³ It stated: “We reject the *Yard-Man* inferences as inconsistent with *ordinary principles of contract law*.”⁸⁴ But, the Court remanded the case for the “court to apply *ordinary principles of contract law* in the first instance.”⁸⁵

Justice Ginsberg, writing the four-justice concurrence, agreed that “*ordinary contract principles, shorn of presumptions*,” apply to CBAs, citing other portions of *Williston* for those “*ordinary*” rules.⁸⁶

75. *Tackett*, 574 U.S. at 438 (emphasis added).

76. *Id.* (emphasis added).

77. *Id.* at 440 (emphasis added) (citing 1 W. Story, *Law of Contracts* § 780 (M. Bigelow ed., 5th ed. 1874) and 11 *Williston* § 31:5).

78. *Id.* (emphasis added) (citing 3 *Williston* § 7.7 (4th ed. 2008); 3 A. Corbin, *Corbin on Contracts* § 553, p. 216 (1960)).

79. *Id.* at 441.

80. *Id.* (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998)).

81. *Id.* (emphasis added).

82. *M&G Polymers USA, LLC v. Tackett*, 733 F.3d 589 (6th Cir. 2013).

83. *Tackett*, 574 U.S. at 442.

84. *Id.* (emphasis added).

85. *Id.* (emphasis added).

86. *Id.* at 443 (Ginsburg, J., concurring) (emphasis added).

The concurrence identified additional interpretative rules relevant to the vesting inquiry.⁸⁷ It emphasized that the majority opinion did not require “clear and express” evidence of vesting and noted that CBA language tying healthcare benefits to pensions, while not conclusive, was nevertheless relevant to ascertaining the parties’ intent.⁸⁸

B. CNH Industrial N.V. v. Reese

Nearly three years after *Tackett*, on February 20, 2018, the Supreme Court issued a *per curiam* decision, *CNH Industrial N.V. v. Reese*,⁸⁹ summarily reversing the Sixth Circuit’s post-*Tackett* decision in favor of a class of about four thousand retirees and spouses.⁹⁰ Based on the *certiorari* petition alone, the Court decided that retiree healthcare benefits did not survive the expiration of the CBA under which the retiree class members had retired.⁹¹ The Supreme Court saw this, “[s]horn of *Yard-Man* inferences,” as a “straightforward” issue, one that required no briefing and oral argument on the merits.⁹²

The Court began its analysis by stating: “This Court has long held that collective-bargaining agreements must be interpreted ‘according to ordinary principles of contract law,’” quoting *Tackett* for that premise throughout the decision.⁹³ In particular, *Reese* quoted *Tackett*’s reference to Story and Williston for “the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties.”⁹⁴

Obscured by the Supreme Court’s laser focus on supposed “ordinary” contract principles is *Tackett*’s disclaimer that ordinary principles of contract interpretation apply to CBAs “at least when those principles are not inconsistent with federal labor policy.”⁹⁵ *Tackett* cited *Lincoln Mills*⁹⁶ for this proposition, but did not further

87. *Id.* (Ginsberg, J., concurring).

88. *Id.* at 443-444 (Ginsburg, J., concurring).

89. *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018).

90. *Id.* at 763, 766-67; Plaintiffs’ Motion for Summary Judgment Ex F, Plaintiffs’ Expert Report of Mark Lynne at 10, *Reese v. CNH America LLC*, 04-70592 (E.D. Mich. Apr. 14, 2014), ECF No. 419-19.

91. *Reese*, 138 S. Ct. at 763, 766-67.

92. *Id.* at 766-67.

93. *Id.* at 763 (quoting *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015)).

94. *Id.*

95. *Tackett*, 574 U.S. at 435.

96. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957).

address this concept.⁹⁷ *Reese* relegated *Lincoln Mills* to a parenthesis after its citation to *Tackett* and deleted any reference to federal labor policy.⁹⁸ Instead, as noted, *Reese* asserted that the Court “has long held” that CBAs “must” be construed “according to ordinary principles of contract law.”⁹⁹

Thus, in *Reese*, even the passing reference to “federal labor policy” in *Tackett* had been airbrushed from judicial consideration, without so much as an ellipsis to mark its passing. Worse, *Tackett* and *Reese* failed to acknowledge the very basic, and previously settled, concept of federal labor policy that collective bargaining agreements *are not ordinary contracts*.¹⁰⁰

Citing the 1874 version of Story on Contracts as applicable to CBAs¹⁰¹ – although CBAs did not become enforceable in federal courts until 1947¹⁰² – demonstrates the present Supreme Court’s unfamiliarity with, or disregard for, federal labor policy. Unlike “ordinary” contracts, a mature CBA is far more than its *written* terms. A CBA is the amalgamation and evolution of hundreds of diverse terms and conditions of employment, a process that often takes decades – and many CBAs – to develop.¹⁰³ Under federal labor policy, a CBA is intended to be one in a continuing series of such agreements between an employer and the labor organization chosen by the employees. Many of the governing rules and standards are determined by the day to day workplace practices developed over years and decades – rather than by the unadorned written words of the most recent agreement.¹⁰⁴

These issues have been extensively addressed by the Supreme Court in landmark decisions – decisions that both *Tackett* and *Reese* completely ignored. Those decisions will now be addressed.

IV. BEFORE *TACKETT* – A CBA “IS NOT AN ORDINARY CONTRACT . . . , NOR IS IT GOVERNED BY THE SAME OLD COMMON-LAW

97. See *Tackett*, 574 U.S. at 435.

98. *Reese*, 138 S. Ct. at 763.

99. *Id.*

100. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

101. *Tackett*, 574 U.S. at 440.

102. Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (2012), provided that federal district courts had jurisdiction over disputes between employers and union arising under collective bargaining agreements.

103. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578-80.

104. *Id.*

CONCEPTS"

A. Lincoln Mills and the Development of Federal Common Law Governing CBAs

In the National Labor Relations Act, passed in 1935,¹⁰⁵ Congress established federal labor policy favoring collective bargaining as the means of ensuring industrial stability.¹⁰⁶ Section 9 provided that labor organizations elected by employees would be the exclusive bargaining representatives in negotiations with their employer.¹⁰⁷ The Act, as amended and expanded by the Labor Management Relations Act of 1947,¹⁰⁸ established a duty for the employer and certified union to bargain in good faith to reach a collective bargaining agreement.¹⁰⁹ The expiration of a particular CBA does not terminate the relationship between the parties.¹¹⁰ To the contrary, federal law requires that the parties bargain in good faith about "mandatory" subjects of bargaining to reach a successor agreement and, while bargaining, maintain existing terms and conditions of employment until they reach agreement or an impasse, even after the expiration of the existing CBA.¹¹¹ The failure of either party to do so is an unfair labor practice.¹¹²

In 1957, *Lincoln Mills* held that Section 301 of the Labor Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements."¹¹³ Three years later, the Court decided several cases doing just that – fashioning federal law under Section 301 for the enforcement of contracts.

In early 1960, the Supreme Court decided *Lewis v. Benedict Coal Corp.*¹¹⁴ There, a mine operator withheld contributions owed under the National Bituminous Coal Wage Agreement to a jointly administered welfare benefit fund to offset damages caused by the

105. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2012)).

106. 29 U.S.C. § 151.

107. 29 U.S.C. § 159.

108. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136.

109. 29 U.S.C. §158(d) (2012).

110. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

111. *Id.* at 198-99.

112. 29 U.S.C. §158(a)(5), (b)(3).

113. *Textile Workers Union v. Lincoln Mills of Ala.* 353 U.S. 448, 451 (1957).

114. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

union's violation of the CBA's no strike clause.¹¹⁵ The Supreme Court addressed two questions: first, whether the union's performance was a condition precedent of the operator's promise to pay into the fund; and second, whether the operator had a valid counterclaim against the fund, a third-party beneficiary to the CBA.¹¹⁶

After deciding against the operator on the first issue, the Court reviewed the status of contract law on the latter issue.¹¹⁷ Citing Corbin for the proposition that it "may perhaps, be regarded as just" to allow the promisor to assert counter-claims against the beneficiary as well as the promise,¹¹⁸ the Supreme Court found such a result acceptable only if courts inferred an intention of the principle contracting parties that the third-party's rights were so limited.¹¹⁹ While, according to the Court, this suggestion of an inference "has not been crystallized into a rule of construction," the Court considered whether it was appropriate to infer such a rule in the context of the contract before it.¹²⁰ The Court declined to do so, stating: "This collective bargaining agreement, however, is not a typical third party contract. The promisor's interest in the third party here goes far beyond the mere performance to that third party . . ."¹²¹

The Court identified that the employer's interest is rooted in the "commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death."¹²² Citing *Lincoln Mills* for its authority to fashion federal law under Section 301, the Court held, based on the several considerations it discussed, including federal labor policy, that parties to a CBA must agree in unequivocal language before the union's breach of *its* promises under a CBA give rise to an employer's

115. *Id.* at 460-62.

116. *Id.* at 466-67.

117. *Id.* at 467.

118. *Id.* at 466-67 (quoting 4 Corbin, Contracts § 819). The Court using the term "counterclaim" and "setoff" may be confusing in the context of a third-party beneficiary contract. As to a two-party contract for promises to pay money, the modern practice was for the promisor to "offset[] the damages he has sustained against the amount he owes . . . " rather than be required to bring a separate action for damages. *Id.* at 467.

119. *Id.*

120. *Id.* at 468.

121. *Id.*

122. *Id.* The Court also noted that the CBA at issue was an industry wide-CBA and if employers generally reduce their contributions to the Fund based on damages claims against the union, the burden would fall on employees and their families. *Id.* at 469.

defense against a duty owed to the *third-party* welfare fund.¹²³

In dissent, Justice Frankfurter agreed that CBAs were not ordinary contracts, but thought it inappropriate to disregard all the "governing rules pertaining to contracts."¹²⁴ He stated that those ordinary rules already "recognize the diversity of situations in relation to which contracts are made and duly allow for these variant factors in construing and enforcing contracts."¹²⁵ He continued: "And so, of course, in construing agreements for the reciprocal rights and obligations of employers and employees, account must be taken of the many implications relevant to construing a document that governs industrial relations."¹²⁶

Justice Frankfurter found this to be no reason for jettisoning ordinary contract principles when they "are as relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements."¹²⁷ He ended by quoting Archibald Cox, "one of our most experienced students of labor law," for the proposition that, just because CBAs have many characteristics that "preclude the application of the familiar principles of contracts and agency," it would nevertheless be unwise to "discard all precepts of contract law," because many of those principles represent "an accumulation of wisdom, . . . bottomed upon notions of fairness and sound public policy."¹²⁸

A few months later, the Supreme Court, in three seminal cases known as the *Steelworker Trilogy*,¹²⁹ addressed the special nature of collectively bargained contracts in the context of arbitration. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,¹³⁰ the Court explained the fundamental difference between a labor contract and a commercial contract:

The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases

123. *Id.* at 470-71.

124. *Id.* at 475 (Frankfurter, J., dissenting).

125. *Id.*

126. *Id.*

127. *Id.* at 475-76.

128. *Id.* at 476 (quoting Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958)).

129. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577 (1960); *United Steelworkers v. Enter. Wheel & Car. Corp.*, 363 U.S. 593, 594-96 (1960).

130. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.¹³¹

The Court expounded on that principle, by again quoting Archibald Cox, albeit from a later article:

‘. . . [I]t is not unqualifiedly true that a collective-bargaining upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. *Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.* We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.’¹³²

The Court noted that in other kinds of contracts, parties enter contracts voluntarily, in the sense that there is no compulsion to deal with one another, as opposed to dealing with other persons.¹³³ The collective bargaining relationship is different because it exists by force of federal statute; the employer cannot choose with whom to contract. And, a “mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time.”¹³⁴ Because of the “breadth of the matters covered, as well as the need for a fairly concise and readable instrument,” a CBA will contain a variety of provisions, some fairly objective and detailed and others “more or less specific” that “require reason and judgment in their application.”¹³⁵ According to the Court, “*industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.*”¹³⁶

131. *Id.* at 578-79.

132. *Id.* at 579-80 (emphasis added) (quoting Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959)).

133. *Id.* at 580.

134. *Id.*

135. *Id.*

136. *Id.* at 581-82 (emphasis added).

In *United Steelworkers of America v. American Manufacturing Co.*,¹³⁷ another of the *Steelworker Trilogy*, the Court held that a state court's "preoccupation with ordinary contract law," that is, reliance on the supposed plain meaning of a CBA, "could have a crippling effect on grievance arbitration."¹³⁸ Justice Brennan wrote in his concurring opinion to all three *Trilogy* decisions: "Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion."¹³⁹

Warrior & Gulf Navigation addressed the role of arbitrators in the collective bargaining system,¹⁴⁰ but the nature and meaning of a CBA, and the intent of the parties to a CBA, do not change depending on the forum in which that agreement is construed and enforced.¹⁴¹ The lesson of *Warrior & Gulf Navigation* is certainly that when courts undertake to interpret CBAs, they must immerse themselves in the law of the shop to correctly perform their interpretive function of determining the parties' intent. Courts must undertake this heightened responsibility because they lack the "same experience and competence" that labor arbitrators bring to the determination of what the labor agreement means.¹⁴²

The Supreme Court decided a series of cases based on these principles. In 1964, the Court decided *John Wiley & Sons, Inc. v. Livingston*,¹⁴³ where it held that a successor employer was bound to arbitrate a dispute with a union under a CBA to which it was not a party.¹⁴⁴ Citing *Warrior & Gulf Navigation*, the Court stated "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a

137. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

138. *Id.* at 566-67.

139. *Id.* at 570 (Brennan, J., concurring).

140. *Warrior & Gulf Navigation Co.*, 363 U.S. 574.

141. In *Senior v. NSTAR Electric & Gas Corp.*, 449 F.3d 206, 220 (1st Cir. 2006), the First Circuit stated that the rule enunciated by *Warrior & Gulf Navigation Co.* "is not simply a rule about the power of arbitrators. The rule has been recognized and used by courts, including the Supreme Court, as substantive law of labor contract interpretation." As the Court stressed in *NLRB v. Strong*, "[a]rbitrators and courts are still the principal sources of contract interpretation." 393 U.S. 357, 360-61 (1969); *Accord Litton Fin. Printing Div. v. NLRB.*, 501 U.S. 190 (1991).

142. *Warrior & Gulf Navigation Co.*, 363 U.S. at 581-582.

143. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

144. *Id.* at 548.

collective bargaining agreement is not an ordinary contract.”¹⁴⁵

In 1966, in *Transportation-Communication Employees v. Union Pacific R. Co.*,¹⁴⁶ the Court employed these principles to decisions of the National Railroad Adjustment Board, stating:

A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. . . . [I]t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant. . . . In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.¹⁴⁷

In *DelCostello v. Teamsters*,¹⁴⁸ the Supreme Court held that the federal statute of limitations for unfair labor practices, rather than state limitations periods, was applicable to Section 301 breach of contract and duty of fair representation claims.¹⁴⁹ The Court explained that when the federal policies at stake are not in line with state law, “[w]e have not hesitated to turn away from state law.”¹⁵⁰ The Court continued:

As Justice Goldberg cautioned, ‘[I]n this Court’s fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process.’¹⁵¹

In *Bowen v. U.S. Postal Service*,¹⁵² the Court addressed the issue of apportioning damages in a hybrid breach of contract and duty of

145. *Id.* at 550.

146. *Transp.-Comm’n Emp. Union v. Union Pac. R.R. Co.*, 385 U.S. 157 (1966).

147. *Id.* at 160-61 (alteration in original) (internal citations omitted) (emphasis added).

148. *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

149. *Id.* at 166.

150. *Id.* at 172.

151. *Id.* (alteration in original) (quoting *Humphrey v. Moore*, 375 U.S. 335, 358 (1964) (Goldberg, J., concurring)).

152. *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983).

fair representation action brought by a discharged employee against his employer.¹⁵³ In defining the interests implicated, the Court cited *Warrior & Gulf Navigation* for the proposition that a CBA “is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.”¹⁵⁴ The Court then continued: “In defining the relationships created by such an agreement [a CBA], the Court has applied an evolving federal common law grounded in national labor policy.”¹⁵⁵

In *NLRB v. Bildisco*,¹⁵⁶ the Court, citing *John Wiley & Sons* and *Warrior & Gulf Navigation*, agreed with the courts of appeals that the “special nature of a collective-bargaining contract, and the consequent ‘law of the shop’ which it creates,” required different treatment in bankruptcy compared to executory contracts.¹⁵⁷ In *Consolidated Rail Corp. v. Railway Labor Executive Ass’n*,¹⁵⁸ a 1989 decision involving a dispute over the employer’s unilateral implementation of drug testing,¹⁵⁹ the Court quoted much of the above from *Transportation Employees* – including the passage that CBAs are not “governed by same old common-law concepts which control such private contracts” – for the proposition that “it is well established that the parties’ ‘practice, usage and custom’ is of significance in interpreting their agreement.”¹⁶⁰ The Court agreed that the employer’s contractual claim, resting “solely upon implied terms of the CBA, as interpreted in light of past practice,” was “neither frivolous nor obviously insubstantial and for that reason, [the] controversy [was] properly deemed a minor dispute within the exclusive jurisdiction of the [Railway Labor] Board.”¹⁶¹

*Warrior & Gulf Navigation*¹⁶² is the seminal case for understanding the unique nature of collective bargaining agreements, how they differ from commercial contracts, and how they must therefore be properly construed in the context of the “common law” of the “particular industry” and the “particular

153. *Id.* at 214.

154. *Id.* at 224 (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)).

155. *Id.* at 224-25 (citing *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960); *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456-57 (1957)).

156. *NLRB v. Bildisco*, 465 U.S. 513 (1984).

157. *Id.* at 524.

158. *Consol. Rail Corp. v. Railway Labor Executive Ass’n*, 491 U.S. 299 (1989).

159. *Id.* at 300-01.

160. *Id.* at 311.

161. *Id.* at 312.

162. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

plant.”¹⁶³ By ignoring *Warrior & Gulf Navigation*, and the line of cases affirming its concept of federal labor policy, the Supreme Court in *Tackett* and *Reese* ignored as well the established principle that CBAs are not “ordinary” contracts. *Tackett* and *Reese* imposed ordinary rules of contract interpretation on CBAs even though the Supreme Court had previously held, in *Transportation Employees*, that “the same old common-law concepts which control . . . private contracts” do not apply to CBAs.¹⁶⁴

Justice Scalia and Justice Kennedy, who joined Justice Thomas’ majority opinion in *Tackett*,¹⁶⁵ had joined the majority opinion in *Consolidated Rail* in 1989.¹⁶⁶ Both had separately stressed the importance of the doctrine of *stare decisis*.¹⁶⁷ Still, at oral argument in *Tackett*, Justice Scalia revealed a breathtaking lack of understanding of the federal labor policy issues involved and a total disregard for the precedent he endorsed in *Consolidated Rail*:

You know, the nice thing about a contract case of this sort is you can’t feel bad about it. Whoever loses deserves to lose. (Laughter) I mean, this thing is obviously an important feature. Both sides knew it [the issue of vesting] was left unaddressed, so, you know, whoever loses deserves to lose for casting this upon us when it could have been said very clearly in the contract. Such an important feature. So I hope we’ll get it right, but, you know, I can’t feel bad about it.¹⁶⁸

No one was asking any Justice to “feel bad” about who wins and

163. *Id.* at 579.

164. *Transp.-Comm’n Emp. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 160-61 (1966). Of course, whether the Court applied “ordinary rules” of contract interpretation to the CBAs in *Tackett* (and *Reese*) is itself debatable. See generally Robert A. Hillman, *The Supreme Court’s Application of “Ordinary Contract Principles” to the Issue of the Duration of Retiree Healthcare Benefits Perpetuating the Interpretation/Gap-Filling Quagmire*, 32 ABA J. LAB. & EMP. L. 299, 310 (2017); Tex Pasley, *Ordinary Principles of Contract Interpretation v. Ordinary Principles of Contract Interpretation: The Future of Retiree Healthcare Benefits After M&G Polymers v. Tackett*, 24 VA. J. SOC. POL’Y & L. 125 (2017). But, that question goes beyond the scope of this article.

165. See *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 429 (2015).

166. *Consol. Rail Corp.*, 491 U.S. at 299.

167. See notes 39-42, *supra*.

168. Transcript of Oral Argument at 21-22, *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

who loses.¹⁶⁹ *Tackett* presented a legal not an equitable issue.¹⁷⁰ The basic function of the Supreme Court is to get the legal issues right and to correctly apply the Court's precedential decisions to those issues. In any contract case, the basic role of the courts is to determine and enforce the intent of the parties at the time they contracted, not to erect artificial barriers to a full understanding what the parties meant.¹⁷¹

When the contract involved is a collective bargaining agreement, and federal labor policy is involved, the same-old rules of who wins and who loses in a commercial contract dispute *do not govern*.¹⁷² The terms of a CBA are *not* limited to what is "said very clearly" in the written document because the written CBA is *not* the entire agreement. The intent of the parties as to the employer's obligation for retiree healthcare benefits may be unclear, that is, ambiguous in the written CBA, but "very clear" from the decades that obligation was in existence. When a CBA is before a court, the inquiry into the parties' intent involves far more than an examination of the written document.¹⁷³ When the Court issued *Warrior & Gulf*

169. Justice Breyer responded to Justice Scalia: "Well, you know, the workers who discover they've been retired for five years and don't have any health benefits might feel a little bad about it." *Id.* at 22. But Justice Breyer himself apparently never learned that *Warrior & Gulf Navigation* refuted Justice Scalia's erroneous and limited view of the nature of the "contract" before the Court – that is, that parties had to say things "very clearly" in a CBA for an obligation to arise.

170. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (Scalia, J.) (claim for money due under contract is an action at law).

171. *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. Cal.*, 813 F.3d 1155, 1165 (9th Cir. 2015) (quoting *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir.2002) ("[T]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it *existed at the time* of contracting."); *Liberty Nat'l Bank & Trust Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 218 F.2d 831, 840 (10th Cir. 1955) ("[T]he basic rule of universal acceptance for the ascertainment of [the parties] intention is for the court, so far as possible, to put itself in the place of the parties when their minds met upon the terms of the agreement. . . .") (alteration in original); 11 SAMUEL WILLISTON AND RICHARD A. LORD, *WILLISTON ON CONTRACTS* §30:6 at 108 (4th ed. 2012) ("[T]he underlying goal in interpreting a contract is to ascertain the intent of the parties, and the surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent").

172. *Transp.-Comm'n Emp. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 160 (1966).

173. This article is not about the substance of the CBAs involved or about whether the Court accurately applied ordinary" rules of contract interpretation to those CBAs. That topic is for another time. But, in *Reese*, when the language relating to retiree healthcare benefits was first agreed upon in 1971, the employer's chief benefit negotiator wrote a letter to every retiree informing them that, if the retiree died first, the retiree's surviving spouse would have healthcare "for the remainder of her lifetime." This promise was repeatedly reiterated by the employer over the next quarter of a century. See Brief for Fox Retiree Committee et al. as Amicus Curiae Supporting Respondents, *M&G Polymers USA*,

Navigation in 1960, it understood this – as it understood the complexity of understanding and interpreting the meaning of the provisions of a CBA, informed as they are by the common law of the industry and the shop.

This is where *Tackett* and *Reese* so utterly failed. If, as *Warrior & Gulf Navigation* held, “industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it,” how can it be, as *Tackett* and *Reese* declared, that “the written agreement is presumed to encompass the whole agreement of the parties?”¹⁷⁴ In *Tackett* and *Reese*, the Court adopted a *presumption* directly contrary to Supreme Court precedent, a presumption that precludes any judicial determination of what a collective bargaining agreement *actually consists of* – and thus what its individual provisions *actually mean*.

In furtherance of its new presumption, *Tackett* criticized the Sixth Circuit for not heeding “the traditional principle that ‘contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.’”¹⁷⁵ There, the Court quoted *Litton Financial Printing Div. v. NLRB*.¹⁷⁶ *Tackett* also quoted *Litton* for the proposition that “‘a collective bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement’s expiration.’”¹⁷⁷ But, *Tackett* stated: “when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.”¹⁷⁸

Tackett omitted two critical sentences from *Litton*.¹⁷⁹ Those sentences are: “Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.”¹⁸⁰ And, the

LLC v. *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

174. *Warrior & Gulf Navigation Co.*, 363 U.S. at 581-82; *Tackett*, 574 U.S. at 440; *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763 (2018).

175. *Tackett*, 574 U.S. at 441-442 (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991)).

176. *Litton*, 501 U.S. 190. In *Litton*, the issue was whether courts owed deference to the National Labor Relations Board’s interpretation of a CBA. The Court held that it did not, because “[a]rbitrators and the courts, rather than the Board, are the principal sources of contract interpretation under § 301 of the Labor Management Relations Act, 1947.” *Id.* at 202.

177. *Tackett*, 574 U.S. at 441-442 (alteration in original) (quoting *Litton*, 501 U.S. at 207).

178. *Id.* at 442.

179. See *Tackett*, 574 U.S. at 441-442; But see *Litton*, 501 U.S. at 207.

180. *Litton*, 501 U.S. at 207. In fact, despite *Tackett*’s criticism, the Sixth Circuit *had* already fully addressed the principles set forth in *Litton*. In *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996), the Sixth Circuit rejected Kelsey-Hayes’ argument, based on *Litton*, that

Tackett concurrence quoted from an earlier passage in *Litton* for the proposition that “[C]onstraints upon the employer after the expiration date of a collective-bargaining agreement’ . . . may be derived from the agreement’s ‘explicit terms,’ but they ‘may arise as well from the . . . implied terms of the expired agreement.’”¹⁸¹

To highlight the obvious, *Tackett*’s inclusion of “explicit” and omission of “implied” distorts *Litton*’s point, which was entirely consistent with the same point in *Transportation Employees, Consolidated Rail and Warrior & Gulf Navigation*.¹⁸² Terms of a CBA may be implicit in the written agreement, and properly derived from customs, usages and practices because this “common law” of the industry and the shop “is equally a part of the collective bargaining agreement *although not expressed in it*.”¹⁸³

Examples such as this illuminate that something other than ignorance of precedent was at work. Another illustration is *Tackett*’s quotation from *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*,¹⁸⁴ coming immediately after its citation to *Lincoln Mills*, as support for the proposition that in interpreting CBAs “the parties’ intentions control.”¹⁸⁵ What is interesting is that the “endeavor” in *Stolt-Nielsen* was not the interpretation of CBAs, but the issue of whether language in a commercial arbitration clause, interpreted under the Federal Arbitration Act,¹⁸⁶ permitted “class” arbitration of commercial disputes.¹⁸⁷

When there are several existing Supreme Court cases that directly address labor arbitration under Section 301 of the Labor Management Relations Act or the Railway Labor Act, including the entire *Steelworker Trilogy*, as well as *John Wiley & Sons* and *Transportation Employees*, the use of *Stolt-Nielsen* as the first citation after *Lincoln Mills* is an odd choice, even for an unremarkable

retirees must prove an “express agreement” to vest. *Id.* at 655. The Sixth Circuit noted that Kelsey-Hayes ignored the same two sentences of *Litton* that are missing from *Tackett*’s discussion. *Id.*

181. *Tackett*, 574 U.S. at 443 (Ginsburg, J., concurring) (alteration in original) (quoting *Litton*, 501 U.S. at 207).

182. See *Litton*, 501 U.S. at 202, 203, 209 (citing both *Lincoln Mills* and *Warrior & Gulf Navigation* in its discussion of the “federal” law applicable to the interpretation of CBAs).

183. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (emphasis added). Also see *Tackett*, 135 U.S. at 938 (Ginsburg, J., concurring) (alteration in original) (quoting *Litton*, 501 U.S. at 207).

184. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

185. *Tackett*, 574 U.S. at 435.

186. Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq.* (2019).

187. *Stolt-Nielsen*, 559 U.S. at 666, 667.

principle that the goal of contract interpretation is to discern the parties' intent. It is more so because the *holding* in *Stolt-Nielsen* has nothing to do with interpreting CBAs – the issue before *Tackett*. There is no doubt, for instance, that union grievances under CBAs often address issues affecting a group or class of employees. The union is, after all, the “collective” bargaining agent of all employees in the bargaining unit.

Further, Supreme Court decisions on arbitration under a CBA, as noted, take a far more expansive view of what the “contract” between the parties is and how the parties' intent is disclosed; the CBA is not limited to the written words of the document and the parties' intent can only be discerned by examining the common law of the industry and shop as well. What is interesting, if perhaps insignificant in analyzing how *Tackett* came to be decided, is that, in *Stolt-Nielsen*, the same justices who joined in Justice Thomas' decision in *Tackett*, cited both *Warrior & Gulf Navigation* and *John Wiley & Sons* for general principles relating to arbitration.¹⁸⁸ Five years later, when *Warrior & Gulf Navigation* and *John Wiley & Sons* held the actual precedent for the precise issue before *Tackett*, the same judges ignored those decisions.¹⁸⁹ In other words, *Warrior & Gulf Navigation* and *John Wiley & Sons* had not been erased from Supreme Court history; just any precedential value they held as to what constitutes a collectively bargained agreement under federal labor policy.

Reese's appraisal is that the Court “has long held that collective-bargaining agreements must be interpreted ‘according to ordinary principles of contract law.’”¹⁹⁰ In this statement, supported only by *Tackett* and a parenthetical citation to *Lincoln Mills*, *Reese* completely re-writes the Court's historical reliance on *Lincoln Mills* as requiring it to hold that the opposite is true – that the “same old” rules of contract law do *not* apply to CBAs. In fact, *Reese* goes much farther than Justice Frankfurter thought wise in his considered but solitary dissent in *Benedict Coal*. Even Justice Frankfurter, in fearing that *all* ordinary contract principles would be abandoned in Section 301 inquiries, nevertheless understood that federal labor policy was critical in understanding what CBAs are and how they are

188. *Id.* at 683 (citing *Warrior & Gulf Navigation Co.*, 363 U.S. at 581); *Id.* at 685 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964))).

189. *Tackett*, 574 U.S. at 429; *John Wiley & Sons*, 376 U.S. at 544; *Warrior & Gulf Navigation Co.*, 363 U.S. at 575.

190. *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763 (2018) (quoting *Tackett*, 574 U.S. at 435).

interpreted.¹⁹¹

Reese, without explanation in a per curiam decision, abandoned any and all pretense that federal labor policy is even relevant to the interpretation of CBAs. According to *Reese*, CBAs, even those first negotiated decades ago, now “must be interpreted ‘according to ordinary principles of contract law’” – period.¹⁹² This seems to be the ultimate abnegation of the principles underlying *stare decisis* – that the Court, by not identifying past precedent, can unanimously implement a legal standard that even a lone dissenter long ago had rejected as inappropriate to the interpretation of CBAs.

It may be pertinent to point out here that, in citing *Lincoln Mills*, *Tackett* got the nuance wrong. The focus of *Lincoln Mills* was not on employing state law to interpret CBAs – it was on encouraging “judicial inventiveness” in fashioning substantive federal law to effectuate federal labor policy, resorting to state law only if a court determines that state law “will best effectuate federal policy.”¹⁹³ This is what *Lincoln Mills* held:

We conclude that the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. *The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.*¹⁹⁴

191. *Lewis v. Benedict Coal Corp.*, 361 U.S. 475-76 (1960) (Frankfurter, J., dissenting). See also David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 664 n.4 (1973). In discussing the evolution of Supreme Court decisions before and after *Lincoln Mills*, Professor David Feller states that, after the *Steelworker Trilogy*, “the effort to construct a legal theory following conventional contract lines was largely abandoned.” *Id.* Until, that is, *Tackett* and *Reese*.

192. *Reese*, 138 S. Ct. at 763 (quoting *Tackett*, 574 U.S. at 435).

193. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957).

194. *Id.* at 456-57 (emphasis added) (internal citations omitted).

So, *Tackett* got it wrong. But *Reese*, in stating that *Tackett* “required” federal courts to interpret CBAs according to “ordinary principles of contract law,” and that the Supreme Court has “long held” that CBAs “must” be so interpreted,¹⁹⁵ got it wrong and backward. Before *Tackett*, the Supreme Court *never* held that federal courts were *required* to apply ordinary principles of contract law. And, *Lincoln Mills* held only that state law “may” be resorted to “if” compatible with the purpose of Section 301.¹⁹⁶ There is a critical, unsubtle difference between words of mandate (“required” or “must”), used in *Reese*, and words in *Lincoln Mills* that are conditional and discretionary (“if” and “may”).¹⁹⁷

Even if read in isolation – without regard to subsequent Supreme Court precedent holding that CBAs are *not* ordinary contracts – *Lincoln Mills* cannot be read to *mandate* the application of ordinary contract law in the interpretation of CBAs. By recognizing that a “range of judicial inventiveness”¹⁹⁸ will be needed to address the myriad issues underlying federal labor policy, *Lincoln Mills* necessarily *rejects* the notion that federal common law under Section 301 is confined to ordinary state law contract principles.

If this were not enough, both *Tackett* and *Reese* asserted, or at least suggested, that the CBAs were “silent” as to the duration of retiree healthcare.¹⁹⁹ But, as the *Tackett* concurrence noted, the CBA explicitly provided that retirees “receiving a monthly pension” were eligible for retiree healthcare.²⁰⁰ When a retiree died, the surviving spouse “will continue to receive [healthcare] benefits . . . until death or remarriage.”²⁰¹ These *are* durational provisions. While these provisions may not be conclusive evidence of an intent to vest, they belie the notion of “silence” as to duration. Indeed, as the four-justice concurrence stated, those provisions are, at the very least, “relevant to this examination” on remand and in other cases.²⁰²

195. *Reese*, 138 S. Ct. at 762-63 (emphasis added).

196. *Lincoln Mills*, 353 U.S. at 457.

197. See, e.g., *Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (unlike prior statute, new statute “does not say ‘may,’ it does not say ‘reasonable,’ and it certainly does not say anything about ‘discretion.’”).

198. *Lincoln Mills*, 353 U.S. at 457.

199. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. at 441; *Reese*, 138 S.S Ct. at 766.

200. *Tackett*, 574 U.S. at 444 (Ginsburg, J., concurring).

201. *Id.* (internal quotations omitted); see Brief of Respondents at 16-17, *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (No. 13-1010).

202. *Tackett*, 574 U.S. at 441, 444 (discussing the concept of “silence” in the context of the “traditional rule” that ambiguous writings should not be construed to create “lifetime promises,” (citing CORBIN ON CONTRACTS, §553, at 216 (1960)). Putting aside whether a

The retirees and surviving spouses whose healthcare benefits were at risk in *Tackett* are entitled to and receiving a vested, lifetime pension – and will be until they die. *Tackett* simply re-wrote the CBA, ignoring relevant evidence of intent, and provided M&G Polymers and other employers with a huge advantage in shedding its retiree healthcare obligations, under the false premise the CBAs were silent as to duration.

The damage done to retirees (and to federal labor law) was immediate.²⁰³ In *Gallo v. Moen Inc.*,²⁰⁴ a post-*Tackett* decision, the Sixth Circuit declined to review extrinsic evidence of the employer's intent because "[t]he first and best way to divine the intent of the parties is from the four corners of their contract and from traditional canons of contract interpretation. . . . Absent ambiguity from this threshold inquiry, no basis for going beyond the contract's four corners exists."²⁰⁵

Gallo's self-assured pronouncement is contrary to *Warrior & Gulf Navigation's* holding that evidence of the common law of the shop – evidence that is by definition outside the "four corners" of the written CBA – is "equally a part of the [CBA] although not expressed in it."²⁰⁶ If the "four corners" of a CBA are not confined to the "written" CBA, it is error to confine analysis of the meaning of a CBA to the *written* text. But, this textual primacy concept in *Tackett* and

promise of healthcare "until death or remarriage" constitutes silence or contains an ambiguity, retiree healthcare is hardly "operative in perpetuity," the phrase *Tackett* quoted from Corbin. By retirement, most of the retiree's "lifetime" has passed in childhood and decades of adult work needed to qualify for the benefit. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993) (stating, "the obligation for which the plaintiffs contend in this suit is not perpetual, because retired people and their widows (or widowers) do not live forever." Perhaps a "reasonable time" for the operation of the promise in the CBA is that found in the CBA – "until death or remarriage" of the retiree's spouse.

203. After *Tackett*, only *Tackett* retirees survived in the Sixth Circuit. *Reese* summarily reversed a post-*Tackett* decision in favor of retirees. *Reese v. CNH America, LLC*, 854 F.3d 877 (6th Cir. 2017). In *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), the Sixth Circuit reversed itself on reconsideration, holding that a CBA that had previously "unambiguously" provided for vested benefits, 549 F.3d 1064, 1075 (6th Cir. 2008) after *Tackett*, did not – as a matter of law. In *Watkins v. Honeywell International, Inc.*, 875 F.3d 312 (6th Cir. 2017), the Sixth Circuit affirmed the district court's dismissal based on *Tackett*. After *Reese*, no panel has yet had the temerity to suggest that any employer ever intended to vest benefits, regardless of previously probative evidence suggesting otherwise. See *Cooper v. Honeywell International, Inc.*, 884 F.3d 612 (6th Cir. 2018); *Fletcher v. Honeywell International, Inc.*, 892 F.3d 217 (6th Cir. 2018).

204. *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2016).

205. *Id.* at 273-74.

206. *Id.* at 273; See also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

Reese – ostensibly derived from “ordinary” principles of contract interpretation rather than federal labor policy – is now apparently the law of the land, despite long standing, well-developed Supreme Court precedent directly to the contrary.

B. Pittsburgh Plate Glass – Vested Retirement Rights Cannot be Altered Without the Pensioner’s Consent

In 1971, the Supreme Court decided *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*²⁰⁷ The issue was whether the employer’s unilateral mid-term modification of the retiree healthcare plan for employees already retired constituted an unfair labor practice.²⁰⁸ The Court affirmed the Sixth Circuit, holding, *inter alia*, that retirees were not employees within the statutory bargaining unit and therefore, the union had no statutory duty to represent them in bargaining.²⁰⁹ The Court also held that bargaining over the healthcare benefits of employees already retired is a permissive, rather than a mandatory subject of bargaining.²¹⁰ The Court concluded, therefore, that the employer’s mid-term modification of retiree healthcare benefits was not an unfair labor practice.²¹¹

The Supreme Court stated in a footnote that its holding did not leave the retirees without protection.²¹² To the contrary, the Court observed, if their former employer changed their benefits without their consent, the retirees would have a breach of contract claim under Section 301:

Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer. . . . This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner’s consent. The retiree, moreover, would have a federal remedy under § 301 of the

207. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S.157 (1971).

208. *Id.* at 159-60.

209. *Id.* at 160, 166, 188.

210. *Id.* at 185. Under the National Labor Relations Act, the employer and union have a duty to bargain in good faith only as to “mandatory” subjects of bargaining. 29 U.S.C. § 158(d) (2012). Refusal to bargain about mandatory subject of bargaining is an unfair labor practice; refusal to bargain about permissive subjects of bargaining is not. *See, id.*

211. *Id.* at 188.

212. *Id.* at 181 n.20.

Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.²¹³

Inherent in *Pittsburgh Plate Glass* is the concept that retiree healthcare benefits could vest *during* the term of a CBA, even though the CBA would, as a matter of course, expire. Also inherent is the concept that if, before or after the CBA expired, the employer changed those benefits, the retiree had an individual breach of contract action under Section 301 to enforce vested rights in federal court. *Pittsburgh Plate Glass* addressed retiree healthcare benefits *in the context of federal labor law and policy*.²¹⁴

In fact, *Yard-Man's* 1983 "contextual" inference, that is, one based on "the context in which these benefits arose," was premised on factors addressed in 1971 in *Pittsburgh Plate Glass* – that retiree benefits are a permissive subject of bargaining.²¹⁵ In the same context, *Yard-Man's* description of retiree healthcare benefits as being typically understood as a form of delayed compensation echoes the statement in *Pittsburgh Plate Glass* that: "To be sure, the future retirement benefits of active workers are a part and parcel of their overall compensation"²¹⁶ And *Yard-Man's* analysis that employees would want assurances that their retirement benefits would continue regardless of future agreements,²¹⁷ echoes the analysis in *Pittsburgh Plate Glass* of the dangers to retirees inherent in the situation in which unions represented the conflicting interests of current employees and retirees in future negotiations.²¹⁸

Yard-Man found it is reasonable that employees would make certain that they nailed down their retirement benefits *before* they retire.²¹⁹ Otherwise, the vagaries of future negotiations, and the shifting balance of power between employer and union, would deprive them of the contractual protection afforded in *Pittsburgh*

213. *Id.* (internal citations omitted).

214. *Id.* at 185.

215. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983). This "contextual" analysis was also based, at least in part, on Brennan's concurrence in *American Manufacturing*. See, *id.* at 1479.

216. *Pittsburgh Plate Glass*, 404 U.S. at 180.

217. *Yard-Man*, 716 F.2d at 1482.

218. *Pittsburgh Plate Glass*, 404 U.S. at 180-82. There is an inherent conflict between the interest and power of current employees, whom employers need for production and who vote on CBAs, and retirees, whose value to the employer is past and who most often cannot not vote on CBAs after retirement. The retirees' power is derived entirely from vested contract rights earned prior to retirement.

219. *Yard-Man*, 716 F.2d at 1482.

Plate Glass.²²⁰

Tackett discounted *Yard-Man's* reliance on the "context" of collective bargaining, including the mandatory/permissive dichotomy of bargaining. In doing so, *Tackett* did not mention *Pittsburgh Plate Glass*, the case *Yard-Man* cited for that discussion.²²¹ *Tackett* denigrated *Yard Man's* analysis of general termination provisions²²² without addressing the fact that its analysis was necessarily derived from the *Pittsburgh Plate Glass* principle that retiree benefits cannot be taken away in subsequent negotiations without the retiree's consent – something that would happen only if the then current CBA had expired. *Tackett* criticized *Yard-Man's* discussion of retiree healthcare benefits as a form of delayed compensation without ever mentioning that *Yard-Man* relied expressly on *Pittsburgh Plate Glass* for that analysis.²²³

In dismissing the idea that retiree healthcare constituted "delayed compensation," *Tackett* cited the definition in ERISA as including plans resulting in "deferral of income" as pension plans, whereas retiree healthcare benefit plans were welfare benefit plans.²²⁴ Of course, Congressional policy as to which benefits Congress intends to statutorily regulate and protect as "pension benefits" says nothing about the understanding or intent of the parties to a CBA. Indeed, the CBA language promising retiree healthcare at issue in *Reese* was negotiated in 1971,²²⁵ years before ERISA became effective.²²⁶ In any event, a "deferral of income" as

220. *Id.*

221. In *Tackett*, the Court discounted the fact that retiree healthcare was a permissive subject of bargaining, stating that "[p]arties, however, can and do voluntarily agree to make retiree benefits a subject of mandatory collective bargaining. Indeed, the employer and union in this case entered into such an agreement." *M&G Polymers USA, LLC v. Tackett*, 574 U.S. at 439. That statement mirrors the argument of the National Labor Relations Board in *Pittsburgh Plate Glass* that the bargaining over retiree benefits had become an industrial practice. The Court's response then was that "would at most . . . reflect the interests of employers and employees in the subject matter as well as its amenability to the collective-bargaining process; it would not be determinative. Common practice cannot change the law and make into bargaining unit 'employees' those who are not." *Pittsburgh Plate Glass Co.*, 404 U.S. at 176. In any event, the issue of whether parties to a CBA agreed to view retiree benefits as a mandatory subject simply changes the "context" of the particular negotiations. And, if the agreement to do so came after the obligation had come due, that agreement would not impact employees already retired and whose rights had vested. *See, id.* at 180-181 n.20.

222. *Tackett*, 574 U.S. at 440.

223. *Id.*

224. *Id.* (citing ERISA, 29 U.S.C. § 1002(2)(A)(ii) (2012)).

225. *Reese v. CNH America, LLC*, 574 F.3d 315, 318 (6th Cir. 2009).

226. *See generally*, 29 U.S.C. §1061 (Sept. 2, 1974) Employee Retirement Income Security

defined by ERISA, means *wages* where the payment is deferred until a later time to defer tax consequences.²²⁷ Congress needed a definition for the benefit it was addressing but did not forever prohibit the use of that term in common parlance to include other postretirement benefits.

Before *Tackett*, the Supreme Court had never relied on ERISA to determine what benefits might have “vested” or “accrued” under a CBA. To the contrary, in *Litton*, decided 15 years after ERISA became law, the Court understood that severance pay was considered a form of “deferred compensation” that could vest under a CBA.²²⁸ *Litton* had this understanding despite the fact that, under ERISA, “severance pay” and “supplemental retirement income payments,” like retiree healthcare benefits, can be considered “welfare plans rather than pension plans.”²²⁹

In 1990, nearly fifteen years after ERISA became effective, the Financial Accounting Board established FASB 106, the rule that requires private sector employers to disclose the present value of the cost of retiree healthcare benefits.²³⁰ The Board explained:

The Board’s conclusions in this Statement result from the view that a defined postretirement benefit plan sets forth the terms of an exchange between the employer and the employee. In exchange for the current services provided by the employee, the employer promises to provide, in addition to current wages and other benefits, health and other welfare benefits after the employee retires. It follows from that view that postretirement benefits are not gratuities but are part of an employee’s compensation for services rendered. *Since payment is deferred, the benefits are a type of deferred compensation. The employer’s obligation for that compensation is incurred as employees render the services necessary to earn postretirement benefits.*²³¹

As employees, retirees viewed their retirement benefits, both pensions and healthcare, as benefits they had earned through

Act of 1974, Pub. L. 93-406, 88 Stat. 829.

227. See ERISA 29 U.S.C. § 1002(2)(A) (2012).

228. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209-10 (1991) (citing *Nolde Brothers, Inc. v. Bakery & Confect. Workers Union*, 430 U.S. 243 (1977)). In *Litton*, the Court disagreed that a seniority provision that included an aptitude requirement that could change over time, was a form of deferred compensation. *Id.* at 210.

229. ERISA, 29 U.S.C. § 1002(2)(B) (2012).

230. See FINANCIAL ACCOUNTING STANDARDS BOARD, *Summary of Statement No. 106* (Dec. 1990), <http://www.fasb.org/summary/stsum106.shtml>.

231. *Id.* (emphasis added).

decades of labor. Upon retirement, retirees understand the benefits they have earned cannot be taken away. In many cases, employees decide to retire early, or to take an early retirement package offered by an employer, as many did in *Reese*, because they were uncertain what might happen in future negotiations. They decided to retire early to lock in the healthcare benefits promised in the then current CBA.

Any employee who paid attention would scoff at the idea that retiree healthcare benefits were anything *but* deferred compensation. Employees understood that, in contract after contract, they received a lower hourly wage because they were paying for retirement benefits, including pension and retiree healthcare. Employers often accounted for the cost of retiree healthcare – and pensions and retiree life insurance – as a separate per-employee hourly cost and shared that costing with the union in negotiations. Unions and employees typically knew exactly how much per hour that the employer took from their wages to pay for retiree healthcare benefits. Active employees saw this cost as wages they were giving up in the present so they would have healthcare benefits after retirement.

Having given up this hourly amount for tens of thousands of hours during their employment, it is easy to understand why employees knew that they earned healthcare during retirement. And, since employers reinforced that idea prior to and at retirement, it is difficult to fault them for understanding that they had *earned* those benefits by working for decades at lower wages.

As noted, *stare decisis* is *most* important “in cases involving property and contract rights, where reliance interests are involved.”²³² In both *Tackett* and *Reese*, the critical issue implicated both the contract rights of retired employees *and* reliance issues – retirees worked for decades in reliance on long-standing, commonly-understood promises of healthcare for themselves and their spouse during retirement. In this context, when the considerations supporting *stare decisis* are at their “acme,”²³³ the failure of the Court to even identify its precedent governing these matters is incomprehensible.

Tackett excoriated *Yard-Man*’s focus on “context” rather than solely on the written words of the CBA, despite the fact that *Warrior & Gulf Navigation*, stressed that the “*law of the shop which implements and furnishes the context of the agreement*” was equally if not more

232. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

233. *Id.*

important than the written word.²³⁴ If “[w]ords in a collective bargaining agreement . . . are to be understood only by reference to the background which gave rise to their inclusion,” as Justice Brennan stated in *American Manufacturing*,²³⁵ *Yard-Man* was right to look beyond the “ordinary rules” of contract law to fashion labor law policy in the context of retiree healthcare benefits.

Yard-Man was an example of the use of “judicial inventiveness” sanctioned by *Lincoln Mills*. *Yard-Man* was an attempt to fashion federal law under Section 301 relating to third-party beneficiaries (retirees), an area that *Benedict Coal* had long ago held was *not* subject to the strictures of ordinary contract law, using contextual factors identified by *Pittsburgh Plate Glass* as relevant to the inquiry.²³⁶ In fact, *Pittsburgh Plate Glass* cited *Benedict Coal* for the proposition that retirees had a direct action against their former employer for breach of contract under Section 301 if their healthcare benefits were unilaterally changed.²³⁷ Thus, there is a direct line from *Lincoln Mills* to *Benedict Coal* to *Pittsburgh Plate Glass* to *Yard-Man*, precedent that *Tackett* entirely missed or simply ignored.

Yard-Man may have been wrong in crafting a “status” inference, or on other individual points, but *Yard-Man* was decided squarely within existing Supreme Court law and relied directly on that precedent for its holdings.²³⁸ *Yard-Man* was decided at a time when

234. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960) (emphasis added).

235. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 570 (1960).

236. It is in this context that, in rejecting *Yard-Man*'s analysis of the “illusory” promise doctrine, *Tackett* misses the point. *Yard-Man* was viewing the issue from the point of the third-party beneficiary employee, not from the perspective of the contracting parties. If a retiree is a third-party beneficiary to the CBA, and has an individual contract right under Section 301, the issue is whether the employer's promise is illusory to that employee – not whether is illusory to every employee covered by the CBA. And, the employee's consideration is *performance*, that is, the decades of work performed to qualify for the employer's promise of retiree healthcare. See *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 498-99 (1960); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1480-82 (6th Cir. 1983). Under *ordinary* contract principles, “[a]n illusory promise is one where the promisor is ‘not obligated to do anything in consideration of’ the other party's promise or *performance*.” *Amerisure Mut. Ins. Co. v. Carey Transp., Inc.*, 578 F. Supp.2d 888, 921 (W.D. Mich. 2008) (quoting *J&B Sausage Co. v. Dep't of Mgmt. & Budget*, 2007 WL28409, *3 n.1 (Mich. App. Jan. 4, 2007) (citing RESTATEMENT (SECOND) OF CONTRACTS §77 (AM. LAW INST.), comment a, page 195 (1981)).

237. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 n. 20 (1971).

238. Unlike *Tackett* and *Reese*, *Yard-Man* cited and relied on, not only *Lincoln Mills*, but *American Manufacturing*, *John Wiley & Sons*, *Transportation Employees* and *Pittsburgh Plate Glass*. *Yard-Man*, 716 F.2d at 1479, 1482. In his dissent to Part II of *Yard-Man*, addressing the employer's purchase of annuities, District Judge Holschuh criticized the majority for

that precedent was still fresh and when collective bargaining was prevalent and relevant to the national dialogue. *Tackett's* wholesale rejection of *Yard-Man*, without understanding and analyzing – without even identifying – the precedent on which *Yard-Man* was explicitly based, creates the suspicion that the Court intentionally decided to ignore its prior precedent *sub rosa* and start anew, undoing promises some 50 years after they were first made.

Tackett and *Reese's* wholesale disregard for its earlier decisions establishing federal labor policy in the context of collective bargaining and the unquestioning application of the “same old common law”²³⁹ contract concepts to CBAs undermines any rational observer’s confidence in anything the Supreme Court says or does in any situation at any time. If the Supreme Court can do what it did to retirees in *Tackett* and *Reese*, it surely can do whatever it wants, whenever it wants, for whatever reason it deems expedient, in any situation, to any citizen litigant. If *stare decisis* can be avoided by simply *ignoring* precedent at the whim of the Court, *stare decisis* is, in Justice Scalia’s words, “no doctrine at all.”²⁴⁰ If this is so, then the Constitutional and judicial protections against arbitrary decision-making have lost an essential common law safeguard.

V. WHAT WENT WRONG

It is unacceptable to assume that the Supreme Court of the United States is collectively incompetent, is collectively ignorant or lacks a collective memory. The Supreme Court is required to know its own precedent and, under the doctrine of *stare decisis*, to follow that precedent or explain why it has decided to change course. Because the internal processes of the Supreme Court are shrouded in secrecy and often are beyond the comprehension of the most experienced lawyers, there must be enough transparency in the Court’s decisions to reveal the underlying rationale of a decision whether it is based in reason, logic or experience.²⁴¹ Otherwise, there

what he saw as an over-reliance on Michigan law of accord and satisfaction, citing *Lincoln Mills* for the proposition that “§ 301 is governed not by state law but by federal substantive law” and that *Lincoln Mills* “cautioned that courts are to utilize state law only if it is compatible with the purpose of § 301 and only if it is ‘the rule that will best effectuate the federal policy.’” *Id.* at 1493 (citing and quoting *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957)).

239. *Transp.-Comm’n Emp. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 160-161 (1966).

240. *Hubbard v. United States*, 514 U.S. 695, 716 (1996) (Scalia, J., concurring).

241. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co., 1881) (“The life of the law has not been logic: it has been experience.”); SIR EDWARD COKE, *THE FIRST*

will be speculation that the Court acted for undisclosed reasons and public confidence in the judiciary will be correspondingly weakened.

The Supreme Court currently has 36 law clerks, famously selected for intellectual and educational excellence honed at America's most elite law schools. One presumes that included in their intellectual resumes and practical legal skills is the ability to perform basic searches on legal databases. If, for example, a law clerk had searched in Westlaw, using only the phrases "ordinary w/5 contract" and "collective w/5 bargaining," and limited the search to the Supreme Court, that clerk would have instantly identified, not only *Lincoln Mills*, but *American Manufacturing*, *John Wiley & Sons*, *Transportation Employees*, *Bowen*, *DelCostello*, *Bildisco* and *Consolidated Rail*,²⁴² all of which stand for the proposition that CBAs are *not* ordinary contracts and are *not* governed by the same old rules as ordinary contracts. Today, if a law clerk types in the same search, *Tackett* and *Reese* appear as the most recent cases, both with holdings stating the exact opposite.²⁴³

Tackett relied heavily on Williston, citing the treatise seven times for the "ordinary" rules of contract interpretation.²⁴⁴ If the Court had examined Williston more closely, it would have discovered that Williston had a separate chapter on collective bargaining agreements, which cited *John Wiley & Sons* and *Warrior & Gulf Navigation*, respectively, for the proposition that a CBA "is not an ordinary contract," but a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."²⁴⁵

PART OF THE INSTITUTES OF THE LAWES OF ENGLAND, OR, A COMMENTARIE UPON LITTLETON: NOT THE NAME OF A LAWYER ONELY, BUT OF THE LAW ITSELF 130 (1628) ("[Reason] is the life of the law."); *Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption."), *abrogated by Trump v. Hawaii* 138 S. Ct. 2392 (2018).

242. Boolean Search for Supreme Court Cases, WESTLAW, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)&bhcp=1](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)&bhcp=1) (search "(ordinary w/5 contract) & (collective w/5 bargaining)"; then narrow "Jurisdiction" to "Federal Supreme Court" cases).

243. The justices and their law clerks could have found all the decisions relying on *Lincoln Mills*' authorization to use "judicial inventiveness" in fashioning federal labor law through key notes searches or Shepardization of *Lincoln Mills*. See Boolean Search for Supreme Court Cases, WESTLAW,

[https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)&bhcp=1](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)&bhcp=1) (search "(ordinary w/5 contract) & (collective w/5 bargaining)"; then narrow "Jurisdiction" to "Federal Supreme Court" cases; sort results by date).

244. The majority cited Williston five times, *M&G Polymers USA, LLC v. Tackett*, 574 U.S. at 435, 438, 439, 440 (twice); the concurrence twice at 443.

245. 20 Williston on Contracts § 55.3 and notes 31, 33 (quoting *Warrior & Gulf Navigation*, 363 U.S. at 579).

The real issue was obscured by the thirty-year battle over the *Yard-Man* inference that came to a head in *Tackett*. The circuit split was not over the interpretation of *Benedict Coal* or *Warrior & Gulf Navigation*, but over the validity of the *Yard-Man* status inference. When the Supreme Court initially granted certiorari in *Tackett*, after repeatedly refusing to do so in cases decided under *Yard-Man*,²⁴⁶ retiree lawyers understood that the *Yard-Man* “status inference” was probably doomed. But, they did not necessarily contemplate that the entire *Yard-Man* contract analysis, based on *Lincoln Mills* and using contract principles to fashion federal common law, would be obliterated as well.

One partial explanation for the lack of focus on governing precedent may be the way *Tackett* came to the Supreme Court. In its writ, M&G Polymers stated the Questions Presented as:

1. Whether, when construing collective bargaining agreements in Labor Management Relations Act (LMRA) cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as the Third Circuit holds; or should require at least some language in the agreement that can reasonably support the interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold.
2. Whether, as the Sixth Circuit has held in conflict with the Second, Third, and Seventh Circuits, different rules of construction should apply when determining whether health-care benefits have vested in pure ERISA plans versus collectively bargained plans.²⁴⁷

246. See *Moore v. Menasha Corp.*, 690 F.3d 444 (6th Cir. 2012), cert. denied 568 U.S. 1250 (2013); *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253 (6th Cir. 2012), cert. denied 568 U.S. 943 (2012); *Rose v. Volvo Const. Equip. N. Am., Inc.*, 331 Fed. Appx. 388 (6th Cir. 2009), cert. denied 559 U.S. 970 (2010); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006), cert. denied 549 U.S. 1019 (2006); *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999), cert. denied 529 U.S. 1067 (2000); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996), cert. denied 519 U.S. 807 (1996); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), cert. denied 475 U.S. 1017 (1986); *Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), cert. denied 465 U.S. 1007 (1984).

247. Petition for Writ of Certiorari, *M&G Polymers USA, LLC. v. Tackett*, 574 U.S. 427 (2015) (No. 13-1010). The Court limited its grant of certiorari to Question 1, *M&G Polymers USA, LLC. v. Tackett*, 572 U.S. 1099 (2014). But the second issue impacted the briefs,

This statement skews the discussion in a manner that deflects attention from the real issue – whether CBAs *are* ordinary contracts that are governed by the same common law rules *as* ordinary contracts. If the real issue had been stated in the first question, the Court and the parties would have focused on the precedent addressing that issue, and under existing precedent, the answer to the second issue would have been apparent – different rules *do* apply to collectively bargained plans.

In *Tackett*, M&G Polymers and its supporting amici, including the Chamber of Commerce and the American Manufacturing Association, sought, not only the demise of the *Yard-Man* inference, but a “clear statement” rule under which retirees could win only if the written CBA clearly and unambiguously provided for “lifetime” or “vested” healthcare benefits.²⁴⁸ They noted that the Sixth Circuit, in *Sprague v. General Motors Corp.*,²⁴⁹ had applied such a rule under ERISA to non-CBA retiree healthcare contracts.²⁵⁰ This line of attack on *Yard-Man* understandably influenced the response. In their brief, the *Tackett* Respondents rejected the way the Petitioner had framed the Question Presented, but not because Petitioner’s approach was contrary to federal labor policy. Instead, they argued:

The answer to the question presented, thus framed as whether the courts should follow alternative A, B, or C, is “No.” There is a fourth alternative, which has the virtues of being both simpler and legally correct: to interpret promises of this character through the traditional principles of contract interpretation, just as the courts interpret all other promises in CBAs.²⁵¹

The *Tackett* Respondents cited *John Wiley & Sons* for the proposition that a CBA “is ‘not an ordinary contract,’” but only in passing.²⁵² They included a parenthetical quote from *American Manufacturing* that “[S]pecial heed should be given to the context in which collective bargaining agreements are negotiated and the purpose they are intended to serve.”²⁵³ Respondents cited

argument and the Court’s opinion.

248. Brief for the Petitioner, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010) [hereinafter Petitioner’s Brief].

249. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388 (6th Cir. 1998).

250. Brief for National Association of Manufacturers as Amicus Curiae Supporting Petitioners at 16-17, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

251. Brief of Respondent at 19, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010) [hereinafter Respondents’ Brief].

252. *Id.* at 20 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964)).

253. *Id.* at 20 (quoting *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960)).

Consolidated Rail only for the proposition that CBAs contain both “express and implied terms” and that imposing a “clear and patent” standard would delegate implied CBA terms to a “less favored” status.²⁵⁴ Ironically, Respondents cited *Transportation Employees* for the proposition that “traditional rules [of contract interpretation] apply fully to the interpretation of CBAs,”²⁵⁵ rather than for the actual holding of *Transportation Employees* that a CBA is “not an ordinary contract” and is not governed by the “same old common-law concepts which control such private contracts.”²⁵⁶ Respondents did not cite *Warrior & Gulf Navigation* or argue that “industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining agreement although not expressed in it.”²⁵⁷

In their brief and at oral argument, *Tackett*’s counsel did not defend the *Yard-Man* inference.²⁵⁸ Instead, at oral argument, *Tackett*’s counsel stated that the retirees would welcome a remand and would prevail under ordinary contract principles, without reliance on any *Yard-Man* inference.²⁵⁹

This author was also concerned that the Court might adopt the employer’s proposed “clear statement” rule. As a result, he filed an amicus brief on behalf of certain Retiree Committees formed in connection with the settlement of the *Yolton*, *Golden* and *Fox* litigation.²⁶⁰ In that brief, this author stressed a “clear statement” rule was inconsistent even with *ordinary* rules of contract interpretation, and argued that those ordinary rules are aimed at determining the actual intent of the parties and often require courts to look beyond the written agreement, even when the language may appear to be unambiguous.²⁶¹

In the process, this author noted that a “clear statement” rule was also contrary to federal labor law, citing the *Steelworker Trilogy*

254. *Id.* at 22, (quoting *Consol. Rail Corp. v. Ry. Labor Executives’ Ass’n*, 491 U.S. 299, 308-309 (1989)).

255. *Id.* at 39.

256. *Transp.-Comm’n Emp. Union v. Union Pac. R.R. Co.*, 385 U.S. 157, 160-61 (1966).

257. See generally Respondents’ Brief, *supra* notes 246-249; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

258. In its reply, the petitioner stated that “[R]espondents try to put as much distance as they can between *Yard-Man* and the judgment in this case.” Reply Brief for Petitioners at 1, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

259. Transcript of Oral Argument at 26, 41, *Tackett*, 574 U.S. 427(2015) (No. 13 1010).

260. See Brief for Fox Retiree Committee et al. as Amici Curiae Supporting Respondents, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

261. *Id.* at 7-11.

for that proposition.²⁶² The author cited both *Lincoln Mills* and *Warrior & Gulf Navigation* for the principle that CBAs are negotiated in unique circumstances and assessed in the broader context of federal labor policy.²⁶³ He quoted Justice Brennan's concurrence in *American Manufacturing* that words in a CBA "can be understood only by reference to the background which gave rise to their inclusion."²⁶⁴ But the focus of the amicus brief was intentionally on "ordinary" contract principles rather than federal labor policy.²⁶⁵

In another amicus brief supporting the *Tackett* retirees,²⁶⁶ the Labor and Benefits Law Professors cited *Groover v. Michelin North America, Inc.*,²⁶⁷ where retirees sued to enforce their collectively-bargained right to lifetime healthcare benefits.²⁶⁸ In *Groover*, the district court cited *Transportation Employees* for the principle that "[a] collective bargaining agreement, however, is not governed by the same principles of interpretation as those that apply to private or commercial contracts."²⁶⁹ The district court held that federal labor policy provided "considerably more latitude in considering extrinsic evidence," not offered under ordinary contract law, in determining the parties' contractual intent.²⁷⁰

The Supreme Court did not have to rely solely on the parties' briefs to discover its precedent. As noted above, *Yard-Man* itself cited not only *Lincoln Mills*, but *John Wiley & Sons*, *Transportation Employees*, and Justice Brennan's concurrence in *American Manufacturing* about how collective bargaining agreements are different from ordinary contracts.²⁷¹ *Yard-Man* cited and relied expressly on *Pittsburgh Plate Glass* for its contextual analysis.²⁷² In his dissent to Part II of *Yard-Man*, District Judge Holschuh cited *Lincoln Mills* for the principle that "it is well settled that the enforcement of [CBAs] under § 301 is governed not by state law but by federal

262. *Id.* at 2.

263. *Id.* at 4-5, 8.

264. *Id.* at 8.

265. See Brief for Fox Retiree Committee et al. as Amici Curiae for the Respondents, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

266. Brief of Labor and Benefits Law Professors as Amici Curiae Supporting Respondents, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

267. *Id.* at 6, n.3.

268. *Groover v. Michelin N. Am., Inc.*, 90 F. Supp. 2d 1236, 1238 (M.D. Ala. 2000).

269. *Id.* at 1247.

270. *Id.*

271. *UAW v. Yard-Man Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *abrogated by* *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).

272. *Id.* at 1482.

substantive law.”²⁷³

None of this mattered. *Yard-Man* had to go. But, *Yard-Man* met its demise in *Tackett* without any reference to the Supreme Court precedent that informed *Yard-Man*.²⁷⁴ In the process, the federal common law of Section 301, fashioned by reference to federal labor policy, was entirely displaced by “ordinary contract principles.”²⁷⁵ Precedent developed over decades was ignored.

In the post-*Tackett* appeal in *Reese*, one of the retirees’ principal arguments to the Sixth Circuit was that *Warrior & Gulf Navigation* required consideration of the common law of the shop as part of the CBA.²⁷⁶ Both the majority and dissent ignored that argument. In its *per curiam* decision, the Supreme Court summarily denied the *Reese* retirees any opportunity to address pre-*Tackett* precedent on the merits.²⁷⁷ In a stunning departure from pre-*Tackett* precedent, *Reese* held that the Court had “long held” that CBAs “must” be interpreted “according to ordinary principles of contract law.”²⁷⁸

In hindsight, retiree advocates may have made what now appear to be tactical misjudgments, in avoiding a full-throated defense of *Yard-Man* and in not providing a more detailed and vigorous discussion of federal labor policy and of *Benedict Coal, Warrior & Gulf Navigation* and their progeny. But, counsel for the retirees in *Tackett* had a duty only to *their* clients – not retirees in general – and the *Tackett* retirees survived to fight another day.²⁷⁹ The Court cannot rely on the parties to identify either the relevant issues or the relevant precedent. The Supreme Court has broader duties than to resolve any individual dispute; the Supreme Court owes fidelity to the rule of law in general and to its precedent.²⁸⁰ Given the

273. *Id.* at 1493 (Holschuh, J. dissenting).

274. This was the same precedent that had informed those employers who agreed in the late-1960’s to provide healthcare benefits for retirees after the implementation of Medicare had made it both inexpensive for them and desirable to employees. *See generally* Brief of Labor and Benefits Law Professors as Amici Curiae in Support of Respondents, *Tackett*, 574 U.S. 427 (2015) (No. 13-1010).

275. *Yard-Man*, 716 F.2d at 1479.

276. *See* Brief of Plaintiffs-Appellees at 25-31, *Reese v. CNH Indus. N.V.*, 854 F.3d 877 (6th Cir. 2017) (No. 15-2382).

277. *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 766-67 (2018).

278. *Id.* at 763.

279. Instead, the Supreme Court remanded the case to the Sixth Circuit. *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 442 (2015). The Sixth Circuit in turn remanded the case to the district court for a determination of whether the healthcare benefits vested under ordinary principles of contract law. *Tackett v. M&G Polymers USA, LLC*, 811 F.3d 204, 210 (6th Cir. 2015).

280. The impact of *Tackett* and *Reese* was immediate and devastating. Thousands of retirees

circumstances at the time – the employer’s push for a “clear statement” rule – it is absurd to think that a different response from the *Tackett* retirees or other amici would have made any difference, particularly after *Reese*.

In *Tackett* and *Reese*, the Supreme Court, the ultimate guardian of the law, reversed long-established precedent *sub silentio*,²⁸¹ and did so apparently intentionally. This is difficult to comprehend and impossible to justify.

VI. A WHOLE NEW BALL GAME

Much has changed since the 1960’s and 1970’s, when the seminal labor law decisions were issued. Globalization and technology have changed the American industrial workplace forever. Union membership has plummeted.²⁸² Michigan, once the arsenal of democracy and the heart of America’s industrial powerhouse, is now the heart of the rust belt.²⁸³ In 2013, Michigan’s Republican governor and Republican controlled legislature, the result of gerrymandered legislative districts, turned the home of the UAW into a Right to Work state.²⁸⁴

As a nation, what was long an industrial economy has become largely a service economy.²⁸⁵ It is the exception rather than the norm for any worker to be employed by a single employer throughout a

and their spouses lost their healthcare benefits as a result. *See supra*, note 202.

281. Defined as “Under silence; without notice being taken; without being expressly mentioned (such as precedent *sub silentio*).” *Sub Silentio*, BLACK’S LAW DICTIONARY (10th ed. Post 2014).

282. The percentage of unionized workforce peaked in 1954 at about 35%. GERALD MAYER, UNION MEMBERSHIP TRENDS IN THE UNITED STATES CRS-11, Figure 1 & CRS-12 (2004). In 1983, it was 20.1 %, but by 2017 had fallen to 10.7%. Press Release, U.S. DEP’T. OF LABOR, Union Members – 2017 (Jan. 19, 2018), https://www.bls.gov/news.release/archives/union2_01192018.pdf.

283. In Michigan, the unionized work force fell from 44.8% in 1964 to 14.7% in 2014. Quoc Trung Bui, *50 Years of Shrinking Union Membership, One Map*, NPR (Feb. 23, 2015), <https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map> (When using the interactive map, adjust slider to 1964 and 2014 to see cited statistics).

284. *See* Mich. Comp. Law Ann. §423.17 (West 2019); Mich. Comp. Law Ann. §423.209(2) (West 2019).

285. Reid Wilson, *Watch the U.S. Transition from a Manufacturing Economy to a Service Economy, in one GIF*, WASH. POST (Sep. 3, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/03/watch-the-u-s-transition-from-a-manufacturing-economy-to-a-service-economy-in-one-gif/?utm_term=.76fbc0cf5f2b.

career.²⁸⁶ As the nature of the workplace has changed, the “portability and continuity” of healthcare benefits from job to job have assumed greater significance and employer-sponsored healthcare has declined.²⁸⁷

In the present economy, employers increasingly hire individuals as “independent contractors” rather than employees. Employers often provide fewer or no benefits to these “contractors” who often work alongside existing employees, doing the same tasks. In the emerging gig economy, companies like Uber and Lyft have “partners” rather than employees. These partners have the “freedom” to work odd and long hours for low pay and no benefits while using their own equipment and paying their own expenses.²⁸⁸ Naturally, the owners of rideshare companies become billionaires while the price of taxi medallions plummet.²⁸⁹

Well-meaning, well-educated elites offer ideas on how to address the lack of collective power of lower and middle class workers by, for example, “crea[ting] a new labor movement” from a “clean slate.”²⁹⁰ Collective bargaining to address this imbalance in power is seen as – and as currently structured may well be – an outmoded means of redress for the grievances of any worker (or any “partner” or “independent contractor” or “colleague” or “associate” or “intern”).

Add to this the inexorable rise in the cost of healthcare,²⁹¹ in

286. Press Release, U.S. DEP’T OF LABOR, *Employee Tenure in 2018* (Sep. 20, 2018), <https://www.bls.gov/news.release/tenure.nr0.htm>.

287. See Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. §1181 (2012).

288. See, e.g., Lawrence Mishel, *Uber and the Labor Market*, ECON. POLICY INST. (May 15, 2018), <https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy>.

289. See Nicole Goodkind, *NYC Taxi Drivers are Killing Themselves, and Some Blame Uber and Lyft*, NEWSWEEK (Mar. 30, 2018), <https://www.newsweek.com/uber-lyft-taxi-drivers-suicide-new-york-city-866994>. (“A taxi medallion, which allows a driver to operate his or her own cab instead of leasing from others, peaked at \$1 million in 2014 but is now worth less than \$200,000.”)

290. Sharon Block and Benjamin Sachs, *This Labor Day, A Clean Slate for Reform*, ON LABOR (Sept. 3, 2018), <https://onlabor.org/this-labor-day-a-clean-slate-for-reform>; See also Kate Andrias, *The New Labor Law*, 126 YALE L. J. 1, 2 (2016); Jay Youngdahl, *Harvard Wants to Save the Working Class*, JACOBIN (Oct. 15, 2018), <https://www.jacobinmag.com/2018/10/clean-slate-labor-law-unions-janus>.

291. According to the Center for Medicare and Medicaid Services (CMS), U.S. healthcare spending in 2017 was \$10,739 per person, or \$3.5 trillion nationally, or 17.9% of Gross Domestic Product. CTR. FOR MEDICARE AND MEDICAID SERVS., *Historical*, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Report>

large part because private employers and government footed the bill for so long – at the prodding of unions who sought benefit improvements in every set of negotiations until the balance of power tipped against them. During and beyond this era of healthcare expansion, the private sector rushed to capitalize on the healthcare market: insurance companies, drug companies, pharmacy benefit managers, third-party administrators and layers of consultants, many owned by private equity companies, all sought a larger piece of the healthcare pie through mergers and acquisitions,²⁹² marketing directed at consumers²⁹³ and physicians,²⁹⁴ more new (or newer versions of) medical procedures, prescription drugs and products for existing and newly identified ailments, and, of course, outright fraud.²⁹⁵ The wages of healthcare and pharma CEOs have soared – whether or not profits did.²⁹⁶

Tension between rising provider income, on the one hand, and attempts to control costs, on the other, has led to even more layers of administration and administrative costs. Insurance providers offer managed care or preferred provider plans intended to reduce costs by encouraging participants to use “network” providers who accept the “network” contract amount for their services. To counter this, consultants offer healthcare providers services, for example, that “defend your clinical decisions and capture proper compensation for every billable service.”²⁹⁷ In turn, other companies offer “re-pricing”

s/NationalHealthExpendData/NationalHealthAccountsHistorical.html (last visited May 14, 2019). In 1960, the healthcare cost per person was \$146 per person, or \$27.2 billion total, for 5% of GDP. *Id.*

292. Kelly Gooch, *Healthcare Mergers and Acquisitions: 6 Things to Know*, BECKER'S HOSP. REVIEW (July 23, 2018),

<https://www.beckershospitalreview.com/hospital-transactions-and-valuation/healthcare-mergers-and-acquisitions-6-things-to-know.html>.

293. Rebecca Robbins, *Drug Makers now spend \$5 billion a year on advertising. Here's what that buys.*, STAT NEWS (Mar. 9, 2016),

<https://www.statnews.com/2016/03/09/drug-industry-advertising/>.

294. Ana Swanson, *Big pharmaceutical companies are spending far more on marketing than research*, WASH. POST (Feb. 11, 2015),

https://www.washingtonpost.com/news/wonk/wp/2015/02/11/big-pharmaceutical-companies-are-spending-far-more-on-marketing-than-research/?noredirect=on&utm_term=.e77104ae04a1.

295. Richard Anderson, *Pharmaceutical industry gets high on fat profits*, BBC NEWS (Nov. 6, 2014), <https://www.bbc.com/news/business-28212223>.

296. Elizabeth Whitman, *Healthcare and Pharma CEOs Paid More than Top Execs in Any Other Industry, Analysis Finds*, INT'L BUS. TIMES (May 25, 2016),

<https://www.ibtimes.com/healthcare-pharma-ceos-paid-more-top-execs-any-other-industry-analysis-finds-2374013>

297. BRAULT, *Practice Solutions for Acute and Emergency Groups*,

services to negotiate and reduce, for a fee, “non-network” claims submitted by doctors and hospitals outside the particular “network.”²⁹⁸

Pharmacy Benefit Managers like Express Scripts, Optum, and Caremark offer programs to plan sponsors intended to reduce the costs of prescription drugs.²⁹⁹ Other consultants offer services intended to gain bargaining leverage for plan sponsors and their participants in negotiations with these PBMs.³⁰⁰ The continued tension between soaring healthcare costs and attempts to manage those costs adds layer after layer to the healthcare morass.

In this scenario, virtually no employer now *offers* retiree healthcare for new employees; very few employers provide full healthcare benefits for any employees. The trend has long been to shift the rising costs to existing employees and to strictly limit what is available to new hires. “Legacy” liabilities for employees long-

https://www.brault.us/services/?utm_source=bing&utm_medium=cpc&utm_campaign=digitalhyve&utm_content=braultcompetitorsbing&msclkid=48195dc3a77516b7f0e201ce8abd3228 (last visited Mar. 1, 2019).

298. See e.g., H.H.C GROUP, *Claims Negotiation and Repricing*, <http://www.hhcgroup.com/claims-negotiation-and-repricing/> (last visited Apr. 2, 2019) (“HHC has established relationships with major national, regional, and local preferred provider networks (PPOs). When our clients submit out-of-network claims, we can often reprice the claims to the significantly lower, pre-negotiated rates which providers in these networks have already agreed.”)

299. Over the Years, PBMs, which were not a major force until the late 1980’s, have since grown exponentially. By 2016, 266 million Americans were in plans administered by PBMs. PBMs save cost by, *inter alia*, negotiating rebates from drug manufacturers and discounts from pharmacies; implementing plans with “tiers” of drugs based on the drug costs to steer participants to lower cost alternatives; implement “mail order” programs; and offering a wide variety of the “utilization management” programs, including “prior authorization,” “step therapy,” and “quantity/duration” reviews. See PHARM. CARE MGMT. ASS’N, *Our Mission*, <https://www.pcmnet.org/our-industry/> (last visited Mar. 1, 2019). Beginning in 2014, PBMs like Express Scripts and Caremark implement drug “exclusions” for a wide variety of drugs as part of their national formulary, offering alternative drugs that were intended to be “clinical” equivalents. See Thomas Reinke, *PBMs Just Say No to Some Drugs- But Not to Others*, MANAGED CARE MAGAZINE (Apr. 5, 2015),

<https://www.managedcaremag.com/archives/2015/4/pbms-just-say-no-some-drugs-not-others>. In the process, PBMS have become behemoths. As of 2018, Express Scripts was the 25th largest company in the United States with \$100 billion in sales and \$4.5 billion in net income. Express Scripts is also in the process of being acquired by the insurer CIGNA for a proposed \$54 billion. See FORTUNE 500, *The Fortune 500*, <http://fortune.com/fortune500/express-scripts-holding/> (last visited May 14, 2019).

300. For example, the Keenan Pharmacy Purchasing Coalition “delivers cost savings and advance prescription management” through “negotiating strength” to leverage “volume discount pricing and the most generous manufacturer drug rebates.” See KEENAN, *Pharmacy Services* <https://www.keenan.com/Solutions/EmployeeBenefits/Pharmacy-Services> (last visited May 14, 2019).

since retired is something that to employers, especially if they have purchased that liability in an acquisition, seems unnecessarily and unfairly burdensome to the bottom line. After *Tackett* and *Reese*, they have little reason for any further anxiety about the legacy of those retirees who earned healthcare benefits by relying on what the employer told them *when* they were earning them. The legacy of *Tackett* and *Reese* is that even those employers who always understood the nature of their obligation to retirees now have a clear roadmap to escape that obligation.

Tackett and *Reese* were decided in the context of present-day realities. But, the promises were not made in the most recent CBA – they were made decades ago. In reliance on those promises, employees worked for decades to earn what they were promised. No court can determine the *meaning* of a promise made in collective bargaining in 1970 without first understanding what the CBA actually *is*. No court can determine what the parties intended in 1970 except “by reference to the background which gave rise” to the promise in 1970.

By failing to cite *Warrior & Gulf Navigation* and long-established principles regarding the fundamental nature of labor agreements and federal labor policy, the Supreme Court relegated decades of the crucially relevant evidence of how the parties themselves viewed their contractual obligations – evidence that was “equally a part of the collective bargaining agreement although not expressed in it”³⁰¹ – to the judicial dust heap.

VII. CONCLUSION

Chief Justice Roberts has stressed that his responsibility, and that of all Supreme Court Justices, is to simply call “balls and strikes,” regardless of their personal predilections. But, the Justices cannot call “balls and strikes” fairly if they do not know where home plate is located. Without *stare decisis*, the Supreme Court is “making up the strike zone as [it] goes along.”³⁰²

During the forty years I have practiced in federal courts, each new Supreme Court nominee has promised fealty to the ideal of impartiality – that he or she would impartially decide cases based on fidelity to precedent rather than personal ideology. Each nominee has been questioned on his or her view of the validity of “precedent”

301. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

302. Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATHOLIC U.L. REV. 683, 685-86 (2016).

and each has pledged – for reasons entirely unrelated to any concern for the rights of retirees – to honor the Court’s existing precedent and the lessons of experience and history.

In the most recent confirmation, *stare decisis* took center stage. Some Senators apparently felt comfortable enough with Judge Kavanaugh’s characterization of *Roe v. Wade*³⁰³ as “settled” law to vote for his confirmation as Justice, despite his earlier advice *not* to refer to *Roe v. Wade* as the “settled law of the land” in 2003.³⁰⁴ And, in his confirmation proceedings, Mr. Kavanaugh referenced his statement in a 2016 law review article that *United States v. Nixon*³⁰⁵ was one of the “greatest moments in American judicial history,”³⁰⁶ to counter his 1999 statements that “maybe Nixon was wrongly decided – heresy though it is to say so.”³⁰⁷ As Paul Simon wrote: “Such are promises, all lies and jests, still a man hears what he wants to hear and disregards the rest.”³⁰⁸

I expect that many of the retirees I represented in *Reese*, whose lives may be shattered by the loss of the benefits they worked so hard to earn, most of whom still live in Wisconsin and Iowa, voted for a President whose principal success so far is to appoint only judges carefully vetted by interest groups who zealously advocated for that loss.³⁰⁹ I know that there are retirees who blame the UAW, not the courts, for this injury.

Stare decisis assumes an even more critical role in times like this when partisan fever – and fundamental disagreements about the

303. *Roe v. Wade*, 410 U.S. 113 (1973).

304. See Robert Barnes and Michael Kranish, *Kavanaugh Advised Against Calling Roe v. Wade “settled law” while a White House Lawyer*, WASH. POST (Sep. 6, 2018), https://www.washingtonpost.com/politics/courts_law/kavanaugh-advised-against-calling-roe-v-wade-settled-law-while-a-white-house-lawyer/2018/09/06/f30216dc-b1df-11e8-a20b-5f4f84429666_story.html?utm_term=.77ceacbd9103.

305. *United States v. Nixon*, 415 U.S. 683 (1974).

306. Kavanaugh, *supra* note 296, at 688.

307. See Greg Stohr, *Kavanaugh Once Thought the Supreme Court’s Nixon Decision Might be ‘Erroneous’*, TIME (July 22, 2018), <http://time.com/5345351/trump-supreme-court-brett-kavanaugh-nixon/>.

308. PAUL F. SIMON, *The Boxer, on BRIDGE OVER TROUBLED WATERS: THE ALBUM* (Columbia Records 1969).

309. This is not to say that the four “Democratic” Justices protected retiree contract rights or protested the failure of *stare decisis*. They failed as miserably as the five “Republican” judges in *Tackett* and *Reese* in identifying governing precedent. The best they could do in their *Tackett* concurrence was to note and correct a few of the majority’s major omissions about *Litton* and “ordinary” contract law principles. See *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 936 (2015) (Ginsburg, J., concurring). In *Reese*, when adherence to ordinary contract law became mandatory, they were agonizingly silent. See generally *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018).

validity of prominent precedent – are acute. Ironically, in such times, when justices are selected for their views on particularly divisive issues and then claim, for example, that their confirmation hearings constitute a “high tech lynching”³¹⁰ or an “orchestrated political hit”³¹¹ by the opposing party, the Constitutional tenure protection – intended to assure judicial independence – may instead be the means for perpetuating existing bias. In this scenario, the Supreme Court must even more scrupulously adhere to the principles underlying *stare decisis* to assure a modicum of impartiality in the judicial decision-making process.

What happened in *Tackett* and *Reese* would not happen if the issue were abortion rights or the authority of the special counsel to subpoena the President. In such cases, no litigant, judge or Justice could possibly ignore *Roe v. Wade* or *United States v. Nixon*. In the current climate, long-established federal labor law policies and the income security of tens of thousands of retirees can pass below the radar of judges and lawyers, as well as most Americans.³¹² But, given the importance of *stare decisis* as a check against a biased judiciary, what happened in *Tackett* and *Reese* cannot be ignored. We must closely examine whenever and wherever the law ends, especially if, as John Locke cautioned, that is where tyranny begins.³¹³

310. *Hearing on the Senate Judiciary Committee of the Nomination of Clarence Thomas to the Supreme Court*, 102nd Cong. (Oct. 11, 1991).

311. *Hearing on the Senate Judiciary Committee on the Nomination of Brett Kavanaugh to the Supreme Court*, 115th Cong. (Sept. 27, 2018), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-5>.

312. None of the law review articles or case commentary the author reviewed on *Tackett* and *Reese* noted their failure to cite or follow Supreme Court precedent. *See, e.g.* Spencer Cook, *The Supreme Court of the United States held that courts shall interpret Welfare plans in employee collective- bargaining agreements using ordinary principles of contract law*, 17 *TRANSACTIONS: THE TENNESSEE J. BUS. L.* 197 (2015); Robert A. Hillman, *The Supreme Court's Application of 'Ordinary Contract Principles' to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire*, 32 *A.B.A. J. LAB. & EMP. L.* 299 (2017); Maria O'Brien Hylton, *After Tackett: Incomplete Contracts for Post-Retirement Healthcare*, 36 *PACE L. REV.* 317 (2016); Bruce Levine, *Labor & Employment Law*, 66 *SYRACUSE L. REV.* 1027, 1069 (2016); Tex Pasley, *Ordinary Principles of Contract Interpretation v. Ordinary Principles of Contract Interpretation: The Future of Retiree Healthcare Benefits After M&G Polymers v. Tackett*, 24 *VA. J. SOC. POL'Y & L.* 125 (2017).

313. John Locke, *Two Treatises of Civil Government*, Book 2, Chapter XVIII, §202, (Hollis ed. 1689) (“Where-ever law ends, tyranny begins, if the law be transgressed to another’s harm; and whoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate; . . .”).